

**A Public Prosecutor v
Syed Muhamad Faysal bin Syed Ibrahim**

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45-18 OF 2002
VT SINGHAM J

B 27 MARCH 2004

Evidence — Identification evidence — Conduct of identification parade — Accused not previously known to witness — Whether identification parade should have been conducted — Significance of identification of accused in court in absence of identification parade

C *Evidence — Forensic evidence — Samples of deceased and accused marked in envelopes — Whether personal knowledge exists regarding source of samples — Weight attached to such evidence*

D *Evidence — Documentary evidence — DNA test report — Nature of DNA evidence — Whether supported by other circumstantial evidence — Weight attached to DNA evidence viewed in isolation*

Evidence — Circumstantial evidence — Standard of proof — Situations in which circumstantial evidence is relied on — Whether evidence points irresistibly to guilt of accused — Weight attached to circumstantial evidence

E The accused was charged with the murder of one Farah Deeba bte Rustam between 2.30pm on 13 February 2001 and 7.15pm on 14 February 2001, an offence punishable under s 302 of the Penal Code. The accused was 16 years at the time of the offence and 19 years at the time of the trial. The prosecution's case was based on circumstantial evidence introduced through 15 witnesses, some of whose evidence were as follows: (a) evidence of owner of the car ACE 8971 ('PW7') who said that the accused had borrowed his car at 1pm on 11 February 2001 and had not returned it until 18 April 2001. PW7 referred to the accused as a 'lelaki Melayu' but that he did not obtain any personal details of this 'lelaki Melayu' as the 'lelaki Melayu' was a complete stranger. The identification of the accused by PW7 in court on 6 August 2003 came about two years and four months later; (b) evidence of the mother of the deceased ('PW8') who said that she was informed by the deceased's younger sister that the deceased had gone out in a motor car ACE 8971 with an unknown male; (c) evidence of the younger sister of the deceased ('PW5') who said that the deceased had gone out with the accused on 13 February 2001 at 2.30pm; (d) evidence of the investigating officer ('PW12') who had stated that the had received from one Dr Mohd Shah ('PW15') several items, namely fingernail clippings of the deceased; blood of the deceased; sample of spermatozoa of the accused; a bra; pubic hair of the deceased and several strands of hair of the deceased; (e) evidence of the chemist ('PW14') who testified that the had examined the exhibits submitted to him in the form of labelled envelopes and packages and had carried out DNA analysis on all the items and (f) evidence of the forensic pathologist ('PW15') who had conducted the post mortem.

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Held, acquitting the accused:

- (1) The necessity for holding an identification parade arises when the accused is not previously known to the witnesses as in the instant case where the 'lelaki Melayu' who had borrowed the motorcar of PW7 was a complete stranger and not known to latter (see para 6).
- (2) The identification of the accused (in court) who was a complete stranger to PW7 ought to have been supported by evidence of an identification which should have been made either at a properly conducted identification parade or if the accused was personally known to PW7 prior to 11 February 2001 and recognised by him as the person known to him. Unfortunately, there was no such evidence to show that this was how PW7 had identified the accused in court as the person who had borrowed his motorcar other than merely pointing out to the accused in court as it was obvious that there was only one person on trial in court (see para 15).
- (3) It is important to observe that there was no evidence that an identification parade was held for PW5 to identify the accused as the person who had gone out with the deceased from the home of PW5 on 13 February 2001 at or about 2.30pm especially so when PW8 in her police report exh P10 has stated that she was informed by PW5 that the deceased had gone out with 'seorang lelaki yang tidak dikenali'. In view of this discrepancy and inconsistency between the evidence of PW5 and PW8 on a crucial piece of circumstantial evidence, it is not only prudent but a necessity for the investigation agency to have held an identification parade for PW5 to identify the 'lelaki yang tidak dikenali' where the deceased was supposed to have gone out on that date (see para 26).
- (4) It could not be denied that one of the most common clues found at the scene of a violent crime is blood which can also be found on the victim or the assailant so as to link the suspect to the scene of crime or the victim. It follows that the nature and the identity of the blood stain are of great assistance to the investigation agency in the construction of the crime. In order to obtain the identity of the blood stain a number of serological techniques are carried out and the duration of the blood stain is also relatively important to determine the identification (see para 35).
- (5) To detect the blood stain, forensic assistance is required. In the instant case, based on the prosecution's evidence, this court found that the prosecution had failed to adduce evidence that the envelopes which were marked and labelled as 'Farrah Deebe bte Rustam', and 'Sayed Mohd Faysal' and which contained blood samples did in fact contain samples of blood taken from the body of the deceased and the accused respectively (see para 35).
- (6) The only evidence that the prosecution had adduced as far as the sample of blood was concerned was from the investigating officer,

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- A** ASP Hasadid bin A Hamid ('PW12') who had stated that he had received from Dr Mohd Shah ('PW15') several items which PW12 believed could assist in the investigation namely: (i) fingernail clippings of the deceased, (ii) blood of the deceased, (iii) sample of spermatozoa of accused, (iv) bra, (v) pubic hair of deceased, (vi) several strands of hair of deceased. PW12 has also stated that he marked the items on the envelope which was given to him as ABCDEF. There was also no evidence as to who had taken the nail clippings and when such clippings were taken from the left and right hand of the deceased other than the evidence of PW13 where in his report exh P18 it was stated that he received an envelope marked C on 22 February 2001 with the name of the deceased on the label from PW12 (see para 35).
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- (7) Other than relying on the label on the envelopes with the name of the deceased and the accused, there was no evidence either from PW13 or PW14 as to whether they had any personal knowledge that the samples of blood that were handed to them were taken from deceased or the accused. The labels on the envelopes which had the names of the deceased and the accused had little legal significance to show proof that the samples of blood belonged to the deceased and the accused unless there was direct evidence that the samples of blood were in fact taken from the deceased and the accused where in the instant case, there was no such admissible evidence. There was no evidence that the samples of blood which were tested by PW13 and PW14 belonged to the deceased and the accused other than relying on the envelopes which had the names of the deceased and the accused (see para 38).
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- (8) DNA evidence becomes very significant if: (i) there is evidence that the accused was near the scene of the crime when it was committed; or (ii) has been positively identified as the suspect; and (iii) there is other relevant and admissible circumstantial evidence. Matching data or the statistical conclusion based upon the random occurrence ratio deduced from the DNA evidence may be of significance and if not doubtful, it is highly probative when there is sufficient additional or circumstantial evidence to connect the suspect with the crime (see para 60).
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- (9) DNA profiling evidence is a developing field of the law of evidence and the court has to examine closely whether the scientific techniques in analysing forensic samples in a particular case is sufficiently developed to support the evidence in the instant case, the evidence of PW14 with a reasonable degree of reliability (see para 41).
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- (10) In any event, it is to be observed that DNA evidence only leads to the drawing of an inference, the weight and value of the evidence still remain within the domain of the courts. Nevertheless, while the admission of DNA evidence is recognised in this jurisdiction, it does not speak as to a fact but it is only an incriminating piece of evidence and the DNA profiling establishes no more than that the suspect could be the offender, not that he or she is the offender. It merely tends to show or
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possibly link a suspect with the crime scene or with the victim by other circumstantial evidence in a criminal trial so as to implicate the suspect or the person charged in court. It is also relevant to establish the identity of the perpetrator of the crime and support other relevant evidence. In some cases DNA evidence may tend to exonerate a suspect to a crime or in a criminal case bearing in mind that in some cases, DNA profiling can be infallible (see para 41).

- (11) In cases where DNA evidence is relied on by the prosecution, the function of the court is to assess the DNA evidence together with all other non-statistical evidence. It is important to observe at this stage that DNA profiling even if accepted by the court merely establishes that the suspect could be the offender and not that he or she is the offender (see para 41).
- (12) In the instant case, since the circumstantial evidence adduced by the prosecution did not irresistibly point to the accused as found by this court the evidence of the DNA test if considered in isolation does not assist the prosecution to connect the accused with the crime unless the DNA test is applied to support the circumstantial evidence and provided the circumstantial evidence points irresistibly only to the guilt of the accused. Since the circumstantial evidence was not accepted by the court to link the accused to the crime of murder, the DNA evidence if viewed in isolation could not assist the prosecution to implicate the accused unless the DNA evidence was supported by other circumstantial evidence and failing which the DNA evidence ceases to be of any assistance to the prosecution to implicate the accused to the crime of murder. As found by this court, PW14 not only did not explain how he had carried out the DNA analysis test but he also did not testify how he had determined or arrived at this statistical calculation to link the sample of blood to the deceased and the accused (see para 67).
- (13) The court also found a material gap and break in the chain of evidence (as to whose sample of blood was in the envelopes) that was so serious that the evidence as to the identity of the suspect was further weakened and in great doubt as to the nexus between the bloodstains and the sample of blood used for comparison by PW14. Consequently, it absolved the accused completely to the extent of even to merely implicating him to the crime of murder and taking into consideration that the circumstantial evidence which the prosecution had relied on contained infirmities and improbabilities (see para 66).
- (14) There was also no medical evidence as to the probable time of the death of the deceased. The forensic pathologist PW15 who conducted the post mortem of the deceased was not even asked by the learned deputy public prosecutor as to the likelihood or probability of the time the death of the deceased had occurred. In the absence of any evidence as to the probable time of the death of the deceased, this court is not only unable to connect the accused with the crime of murder but is unable to make any finding that the deceased was murdered between

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- A** 2.30pm on 13 February 2001 and 7.30pm on 14 February 2001 as framed by the charged. This was a clear case of the prosecution attempting to proceed on the basis of speculation as to the date and time of death of the deceased where the prosecution had every opportunity to show some nexus as to the probable time the deceased could have been murdered by seeking the opinion of the forensic pathologist PW15 but failed in its duty to obtain this material piece of evidence to support the charge (see para 70).
- B**
- C** (15) Circumstantial evidence is usually relied on whether there is no independent witness or witnesses who would come forward to relate the incident or the truth. It is the type of evidence of the surrounding circumstances which by undersigned or coincidence is capable of leading to only one conclusion, that is irresistibly to the guilt of the accused. In the instant case, on the totality of the evidence adduced by the prosecution through 15 witnesses, it is regrettable that the prosecution's case contained infirmities and improbabilities that the charge cannot be sustained or even amended to a lesser charge. The prosecution failed to establish a *prima facie* case (see s 180 of the Criminal Procedure Code) against the accused on the charge of murder or any offence on the date, time and place as framed by the prosecution although the case law is that the prosecution has to establish its case beyond reasonable doubt where the prosecution has relied on circumstantial evidence. Therefore, this court is left with no alternative but to acquit and discharge the accused (see paras 72 and 133).
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[Bahasa Malaysia summary]

- F** Tertuduh telah dituduh dengan pembunuhan Farrah Deebe bte Rustam diantara 2.30ptg pada 13 Februari 2001 dan 7.15ptg pada 14 Februari 2001, satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan. Tertuduh berumur 16 tahun pada masa kesalahan dan 19 tahun pada masa perbicaraan. Kes pihak pendakwaan berdasarkan keterangan ikut keadaan yang dikemukakan melalui 15 saksi, di antara keterangan mereka adalah seperti berikut: (a) keterangan pemunya kereta ACE 8971 ('PW7') yang berkata bahawa tertuduh telah meminjam kereta beliau pada 1ptg pada 11 Februari 2001 dan hanya memulangkannya pada 18 April 2001. PW7 merujuk kepada lelaki itu sebagai 'lelaki Melayu' tetapi beliau tidak mendapatkan sebarang butiran berkait dengan 'lelaki Melayu' itu kerana 'lelaki Melayu' adalah seorang yang tidak dikenali. Pengecaman tertuduh oleh PW7 di dalam mahkamah berlaku dua tahun dan empat bulan selepas itu; (b) keterangan ibu si mati ('PW8') yang berkata bahawa beliau telah diberitahu oleh adik perempuan si mati bahawa si mati telah keluar dengan tertuduh di dalam kereta ACE 8971 dengan seorang lelaki yang tidak dikenal; (c) keterangan adik perempuan si mati ('PW5') yang berkata bahawa si mati keluar dengan tertuduh pada 13 Februari 2001 pada 2.30ptg; (d) keterangan pegawai penyiasat bahawa beliau telah menerima beberapa barang daripada Dr Mohd Shah ('PW15'), iaitu, keratan kuku jari si mati; darah si mati; sampel spermatozoa tertuduh, coli,
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bulu pubik si mati dan beberapa helai rambut daripada si mati; (e) keterangan ahli kimia ('PW14') yang memberi keterangan bahawa beliau telah memeriksa eksibit-eksibit yang diberi kepada beliau di dalam sampul surat yang dilabelkan dan bungkusan dan telah menjalankan analisa ke atas semua barang-barang dan (f) keterangan ahli patologi forensik ('PW15') yang telah menjalankan post mortem.

Diputuskan, membebaskan tertuduh:

- (1) Keperluan untuk mengadakan satu perbarisan cam berbangkit apabila tertuduh tidak dikenali terdahulunya oleh saksi-saksi seperti di dalam kes ini di mana 'lelaki Melayu' yang telah meminjam kereta PW7 adalah seorang yang tidak dikenali oleh PW7 (lihat perenggan 6).
- (2) Pengecaman tertuduh (di mahkamah) yang merupakan seorang yang tidak dikenali oleh PW7 patut disokong oleh keterangan pengecaman yang patut diadakan di dalam satu pembarisan cam yang dikendalikan dengan betul atau jika tertuduh dikenali oleh PW7 sebelum 11 Februari 2001 dan dicam oleh beliau sebagai seorang yang dikenali beliau. Walau bagaimanapun, tiada keterangan untuk menunjukkan bahawa ini adalah cara bagaimana PW7 mengecam tertuduh di mahkamah sebagai orang yang meminjam kereta beliau selain daripada menunjuk jari kepada tertuduh di mahkamah sebab ia jelas bahawa hanya terdapat seorang yang dibicarakan di mahkamah (lihat perenggan 15).
- (3) Ia adalah penting untuk membuat perhatian bahawa tiada keterangan bahawa satu pembarisan cam telah diadakan untuk PW5 mengecam tertuduh sebagai orang yang keluar dengan si mati dari rumah PW5 pada 13 Februari 2001 pada 13 Februari pada atau di sekitar 2.30ptg memandangkan bahawa PW8 di dalam laporan polis beliau eks P10 telah berkata bahawa beliau diberitahu oleh PW5 bahawa si mati telah keluar dengan 'seorang lelaki yang tidak dikenali'. Memandangkan percanggahan dan keterangan PW5 dan PW8 yang tak konsisten pada keterangan mengikut keadaan yang penting, ia adalah bijak dan perlu untuk agensi penyiasat untuk mengadakan satu pembarisan cam untuk PW5 mengecam 'lelaki yang tidak dikenali' di mana si mati dikatakan keluar untuk temu janji itu (lihat perenggan 26).
- (4) Tidak dapat dinafikan bahawa satu daripada bukti yang biasa yang dijumpai di tempat kejadian kesalahan yang ganas adalah darah yang dapat dijumpai pada mangsa dan penyerang untuk menghubungkan suspek kepada tempat kejadian kesalahan itu atau mangsa. Oleh itu sifat dan identiti kesan darah dapat menolong agensi penyiasat di dalam pembinaan kesalahan itu. Untuk memperolehi identiti kesan darah itu, beberapa teknik serologi telah dijalankan dan tempoh kesan darah juga penting untuk memastikan identiti (lihat perenggan 35).
- (5) Untuk mengesan kesan darah, bantuan forensik diperlukan. Di dalam kes ini, berdasarkan keterangan pihak pendakwaan, mahkamah ini memutuskan bahawa pihak pendakwa gagal mengemukakan keterangan bahawa sampul surat yang ditandakan dan dilabel sebagai 'Farrah Deeba

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- A** bte Rustam' dan 'Sayed Mohd Faysal' dan yang mempunyai kesan darah mempunyai sampel darah yang diambil daripada badan si mati dan tertuduh masing-masing (lihat perenggan 35).
- (6) Satu-satunya keterangan yang dikemukakan oleh pihak pendakwaan yang berkaitan dengan sampel darah itu adalah daripada pegawai penyiasat, **B** ASP Hasadid bin A Hamid ('PW12') yang berkata bahawa beliau telah menerima daripada Dr Mohd Shah ('PW15') barang-barang yang dipercayai PW12 boleh membantu di dalam penyiasatan, iaitu: (i) keratan kuku jari si mati, (ii) darah si mati, (iii) sampel spermatozoa tertuduh, (iv) coli, (v) bulu pubik si mati, (vi) beberapa helai rambut si mati. **C** PW12 juga berkata bahawa beliau menandakan barang-barang itu pada sampul surat yang diberikan kepada beliau sebagai ABCDEF. Tiada keterangan berkaitan dengan siapa yang telah mengambil keratan kuku jari dan bila keratan kuku jari diambil daripada tangan kanan dan kiri si mati selain daripada keterangan PW13 di mana di dalam laporan beliau eks 18 dikatakan bahawa beliau menerima sepucuk sampul surat bertanda C pada 22 Februari 2001 dengan nama si mati pada labelnya daripada PW12 (lihat perenggan 35).
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- (7) Selain daripada bergantung kepada label pada sampul surat dengan nama si mati dan tertuduh, tiada keterangan sama ada daripada PW13 atau PW14 sama ada mereka mempunyai pengetahuan sendiri bahawa sampel darah yang diberikan kepada mereka diambil daripada si mati atau tertuduh. Label-label pada sampul surat yang mempunyai nama **E** si mati dan tertuduh mempunyai kepentingan undang-undang yang kurang untuk menunjukkan bukti bahawa sampel darah adalah daripada si mati dan tertuduh kecuali terdapat keterangan terus bahawa sampel darah diambil daripada si mati dan tertuduh, di mana di dalam kes ini **F** tiada keterangan yang boleh diterima. Tiada keterangan bahawa sampel darah yang telah diuji oleh PW13 dan PW14 adalah darah si mati dan tertuduh selain daripada bergantung kepada sampul surat yang mempunyai nama si mati dan tertuduh (lihat perenggan 38).
- (8) Keterangan DNA menjadi penting jika: (i) terdapat keterangan bahawa **G** tertuduh berada dekat dengan tempat kejadian kesalahan itu semasa ia dilakukan; atau (ii) telah dicam dengan positif sebagai suspek; dan (iii) terdapat keterangan mengikut keadaan relevan yang lain yang boleh diterima. Data yang sepadan atau kesimpulan statistik berdasarkan nisbah kejadian rambang yang didapati daripada keterangan DNA mungkin penting dan jika tidak ragu, ia adalah amat probatif apabila **H** terdapat keterangan tambahan yang mencukupi atau keterangan mengikut keadaan untuk menghubungkan suspek dengan kesalahan itu (lihat perenggan 60).
- (9) Keterangan memprofil DNA adalah satu lapangan yang sedang **I** membangun di dalam undang-undang keterangan dan mahkamah mestilah memeriksa dengan teliti sama ada teknik-teknik saintifik dalam menganalisis sampel-sampel forensik di dalam sesuatu kes adalah cukup dibangunkan untuk menyokong keterangan di dalam kes ini,

keterangan PW14 dengan tahap kebolehpercayaan yang munasabah (lihat perenggan 41).

- (10) Walau bagaimanapun, mesti diperhatikan bahawa keterangan DNA hanya membawa kepada inferens, kepentingan dan nilai keterangan masih dengan mahkamah. Walau bagaimanapun, walaupun penerimaan keterangan DNA dibenarkan di dalam bidang kuasa ini, ia tidak mengatakan satu fakta tetapi hanya adalah keterangan yang dapat menunjukkan kesalahan dan profil DNA menunjukkan hanya bahawa seseorang mungkin orang yang melakukan kesalahan itu, bukan bahawa orang itu adalah orang yang melakukan kesalahan itu. Ia hanya cenderung menunjukkan atau mungkin menghubungkan seseorang suspek kepada tempat kejadian itu ataupun dengan mangsa melalui keterangan mengikut keadaan lain di dalam perbicaraan jenayah lain untuk membabitkan suspek itu atau orang yang dituduh di mahkamah. Ia juga relevan untuk menunjukkan identiti orang yang melakukan kesalahan itu dan menyokong keterangan yang relevan. Di dalam kes-kes tertentu, keterangan DNA dapat membebaskan seseorang suspek daripada satu kesalahan atau daripada kes jenayah dan di dalam kes-kes tertentu, ia mesti diingatkan bahawa profil DNA tidak dapat disangkal (lihat perenggan 41).

- (11) Di dalam kes-kes di mana pihak pendakwaan bergantung kepada keterangan DNA, fungsi mahkamah adalah untuk mentaksirkan keterangan DNA bersama dengan keterangan yang tidak berstatistik. Ia adalah penting untuk memerhatikan pada tahap ini bahawa profil DNA, jikapun diterima oleh mahkamah, hanya membuktikan bahawa suspek tersebut mungkin adalah orang yang melakukan kesalahan itu dan bukan bahawa beliau telah melakukan kesalahan itu (lihat perenggan 41).

- (12) Dalam kes ini, memandangkan bahawa keterangan mengikut keadaan yang dkemukakan oleh pihak pendakwaan tidak menunjuk dengan nyata kepada tertuduh seperti yang diputuskan oleh mahkamah ini keterangan ujian DNA jika dipertimbangkan sendirinya tidak dapat membantu pihak pendakwaan menghubungkan tertuduh dengan kesalahan itu kecuali jika ujian DNA dipakai untuk menyokong keterangan mengikut keadaan dan kecuali jika keterangan mengikut keadaan menunjuk dengan nyata kepada kebersalahan tertuduh. Memandangkan bahawa keterangan mengikut keadaan itu tidak diterima oleh mahkamah untuk menghubungkan tertuduh kepada tempat kejadian pembunuhan itu, keterangan DNA itu, jika dilihat dengan sendirinya, tidak dapat membantu pihak pendakwaan untuk membabitkan tertuduh kecuali jika keterangan DNA itu disokong oleh keterangan mengikut keadaan yang lain dan jika ini gagal, keterangan DNA itu tidak dapat membantu pihak pendakwaan untuk membabitkan tertuduh dengan kesalahan membunuh (lihat perenggan 67).

- (13) Mahkamah juga mendapati satu lopang dan lubang dalam rangkaian keterangan (berhubung dengan pemilik sampel darah di dalam sampel

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- A** surat) yang sangat serius menyebabkan keterangan berkait dengan identiti suspek itu semakin lemah dan diragukan berkaitan dengan perhubungan di antara kesan darah dan sampel darah yang digunakan untuk perbandingan oleh PW14. Akibatnya, ia telah membebaskan tertuduh sepenuhnya sehingga ke takat hanya membabitkan beliau dengan kesalahan membunuh dan mempertimbangkan bahawa keterangan
- B** mengikut keadaan yang mana pihak pendakwa bergantung kepada mempunyai kecacatan dan tidak munasabah (lihat perenggan 66).
- (14) Tiada keterangan perubahan berkait dengan masa yang mungkin kematian simati. Ahli patologi forensik PW15 yang menjalankan post mortem si mati tidak ditanya oleh timbalan pendakwa raya yang terpelajar kemungkinan masa kematian si mati berlaku. Di dalam ketiadaan keterangan berkait dengan masa mungkin kematian si mati, mahkamah ini bukan sahaja tidak dapat menghubungkan tertuduh dengan kesalahan membunuh tetapi tidak dapat memutuskan bahawa si mati dibunuh di antara 2.30ptg pada 13 Februari dan 7.30ptg pada 14 Februari seperti dibuat di dalam pertuduhan. Ini adalah kes yang jelas menunjukkan bahawa pihak pendakwa membuat cubaan dengan meneruskan kes berdasarkan spekulasi atas tarikh dan masa si mati dimana pihak pendakwaan mempunyai beberapa peluang untuk menunjukkan perhubungan di antara masa si mati mungkin dibunuh dengan meminta pendapat ahli patologi forensik PW15, tetapi gagal di dalam kewajibannya untuk mendapatkan keterangan material ini untuk menyokong pertuduhan (lihat perenggan 70).
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- (15) Keterangan mengikut keadaan biasa digunakan apabila tiada saksi atau saksi-saksi yang mengemukakan diri untuk memberitahu apa yang sebenarnya berlaku. Ia adalah jenis keterangan keadaan sekeliling yang melalui kebetulan dapat membawa kepada satu kesimpulan, iaitu menunjuk dengan nyata kebersalahan tertuduh. Di dalam kes ini, pada keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan melalui 15 saksi, ia adalah disesali bahawa kes pihak pendakwaan mempunyai kecacatan dan tidak munasabah sehingga pertuduhan itu tidak dapat dikekalkan ataupun dipinda ke pertuduhan yang kurang.
- F** Pihak pendakwaan gagal membuktikan kes *prima facie* (lihat s 180 Kanun Prosedur Jenayah) terhadap tertuduh pada pertuduhan membunuh atau sebarang kesalahan pada tarikh, masa dan tempat seperti yang dikatakan oleh pihak pendakwaan walaupun melalui undang-undang kes, pihak pendakwaan mesti membuktikan kesnya melampaui keraguan munasabah di mana pihak pendakwaan bergantung kepada keterangan mengikut keadaan. Oleh itu, mahkamah ini perlu membebaskan dan melepaskan tertuduh (lihat perenggan 133).]
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Notes

- I** For cases on DNA test reports, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1119.
For cases on the conduct of identification parades, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1621–1623.

For cases on the standard of proof of circumstantial evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 612–628. **A**
 For identification parade, see 12 *Halsbury's Laws of Malaysia*, para [210.066].
 For standard of proof of circumstantial evidence, see 12 *Halsbury's Laws of Malaysia*, para [210.012].

Cases referred to

- Abdul Jalil bin Abdul Satar v PP* [1991] 2 MLJ 194 (refd)
Abdullah bin Saad v PP [1956] MLJ 92 (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16 (folld)
Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (folld)
A Jayaraman v The State of AP 1995 Cri LJ 366 (folld) **C**
Arthurs v Attorney-General for Northern Ireland [1971] 55 Cr App R 161 (folld)
Caswell v Powell Dufflyn [1940] AC 152 (refd)
Chan Chwen Kong v PP [1962] MLJ 307 (refd)
Chandmal & Anor v State of Rajasthan AIR 1976 SC 917 (refd)
Chandu v State of Madhya Pradesh AIR 1992 SC 2302 (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36 (folld) **D**
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Dato' Mokhtar bin Hashim v PP [1983] 2 MLJ 232 (refd)
De Gruchy v The Queen 211 CLR 85 (folld)
Eng Sin v PP [1974] 2 MLJ 168 (folld)
Gambhir v State of Maharashtra AIR 1982 SC 1157 (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd) **E**
Harchand Singh v State of Haryana AIR 1974 SC 344 (folld)
Heng Aik Ren Thomas v PP [1998] 3 SLR 465 (refd)
Hoh Keh Peng v PP [1948] MLJ 3 (refd)
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Idris v PP [1960] MLJ 296 (folld)
Inderjeet Singh v State of Punjab AIR 1991 SC 1674 (refd) **F**
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Jaafar bin Ali v PP [1998] 4 MLJ 406 (folld)
Jaharlal Das v State of Orissa AIR 1991 SC 1388 (refd)
Jayaraman & Ors v PP; Mohd A [1982] 2 MLJ 306 (folld)
Jones v Carter 1956 Crim LR 275 (refd)
Jubri v PP [1962] MLJ 34 (folld)
Juraimi Husin v PP; Mohd Affandi bin Abdul Rahman & Anor v PP [1998] **G**
 1 MLJ 537 (folld)
Kali Ram v State of HP AIR 1973 SC 2773 (folld)
Kamis v PP [1975] 1 MLJ 46 (folld)
Kanan & Ors v State of Kerala AIR 1979 SC 1127 (folld)
Kansa Behera v State of Orissa AIR 1987 SC 1507 (refd)
Karam Singh v PP [1967] 2 MLJ 25 (folld) **H**
Kartar Singh & Anor v Rex [1952] MLJ 85 (folld)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Kiew Foo Mui & Ors v PP [1995] 3 MLJ 505 (refd)
Krishnan v PP [1987] 1 MLJ 292 (refd)
KS Roberts v PP [1970] 2 MLJ 137 (folld)
Lavji Mona v State of Gujarat Cri LJ 3148 (refd) **I**
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Leow Nghee Lim v Reg [1956] MLJ 28 (folld)

- A** *Lim Foo Yong v PP* [1976] 2 MLJ 259 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (refd)
Mahinder Singh v PP [1967] 1 MLJ 126 (refd)
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McGreevy v Director of Public Prosecutions [1973] 1 WLR 276 (folld)
- B** *Mehtab Singh v State of MP* AIR 1975 SC 274 (refd)
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(1) *Namasiyam*, (2) *Rajindran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v PP* [1987] 2 MLJ 336 (refd)
Ng Hoong Kee v PP [1967] 1 MLJ 85 (refd)
Ng Thian Soong v PP [1990] 2 MLJ 148 (refd)
- C** *Ong Yap Chang v PP* [1962] MLJ 46 (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705 (refd)
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PP v Abu Bakar bin Abdul Malek @ Mohd Yunus a/l Sumania [1990] 1 CLJ 1179 (refd)
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- D** *PP v Kasmin bin Soeb* [1974] 1 MLJ 230 (refd)
PP v Kau Joo Huat [1988] 2 MLJ 91 (refd)
PP v Lai Pong Yuen & Ors [1968] 1 MLJ 12 (refd)
PP v Lam Kim Pau & 6 Others [1948] MLJ 116 (refd)
PP v Lee Eng Kooi [1993] 2 MLJ 332 (refd)
PP v Liew Sam Seong [1982] 1 MLJ 223 (refd)
- E** *PP v Muhamad Nasir bin Shahrudin & Anor* [1994] 2 MLJ 576 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (dist)
PP v R Balasubramaniam [1948] MLJ 119 (folld)
PP v Sarjit Kaur a/p Najar Singh [1998] 1 MLJ 184 (refd)
PP v Yiau Swee Tung [1999] 3 MLJ 353 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (refd)
- F** *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 (refd)
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Percival Leonard Taylor, James Weaver and George Thomas Donovan 1928 Cr App R 20 (refd)
Phoon Liat Sum v PP [1950] MLJ 205 (refd)
- G** *R v Courtie* [1984] 1 All ER 740 (refd)
R v Deen The Times 10 January 1994 (refd)
R v Doheny and R v Adams 1997 1 Cr App Rep 369 (refd)
R v Kelly (1992) 92 DLR (4th) 643 (SCC) (refd)
R v Kotzmann [1999] 2 VR 723 (refd)
R v Milat [1996] 87 A Crim R 446 (refd)
R v Noll [1999] 3 VR 704 (refd)
- H** *R v Pantoja* [1996] 88 A Crim R 544 (refd)
Ram Avtar v The State (Delhi Administration) AIR 1985 SC 1692 (refd)
Ram Jag v State of Uttar Pradesh AIR 1974 SC 606 (refd)
Rangapula & Anor v PP [1982] 1 MLJ 91 (refd)
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- I** *Shand v R* [1996] 1 All ER 511 (dist)
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Sia Soon Suan v PP [1966] 1 MLJ 116 (refd)

State of Haryana v Ved Prakash AIR 1994 SC 468 (refd)
Sunny Ang v PP [1963] 2 MLJ 195 (dist)
Surinder Pal Jain v Delhi Administrator AIR 1993 SC 1723 (refd)
Tai Chai Keh v PP (1948–49) MLJ Supp 105 (folld)
Teoh Hoe Chye v PP; Yeap Theong Tean v PP [1987] 1 MLJ 220 (folld)
Teoh Ng Choon & Ors v PP [1955] MLJ 58 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Wallace 23 Cr AR 32 (refd)
William Herbert Wallace 23 Cr App R 35 (refd)
Woolmington v DPP [1935] AC 462 (folld)
Zahari bin Yeop Baai & Anor v PP [1980] 1 MLJ 160 (folld)

Legislation referred to

Companies Act 1965 s 131(1)
 Criminal Procedure Code ss 113, 180
 Penal Code ss 34, 201, 302, 304, 411
 Penal Code [India] ss 147, 149, 302, 304
 Road Traffic Ordinance 1958 ss 74(1), 92(1)

Norazura bte Mohamed Mokhtar DPP for the prosecution.
Bachan Singh (Bachan & Kartar) for the accused.

VT Singham J:

[1] In this case, the charge against the ‘penama’ (‘the accused’) is as follows:

Bahawa kamu pada di antara jam lebih kurang 2.30 petang 13.02.2001 hingga jam lebih kurang 7.15 petang 14.02.2001 di dalam longkang besar di bawah jambatan, jalan masuk ke Kampung Tersusun Batu 2, Jalan lama Bidor, Tapah di dalam Daerah Batang Padang di dalam Negeri Perak Darul Ridzuan, telah melakukan pembunuhan dengan melibatkan kematian seorang bernama FARRAH DEEBA BT RUSTAM KP NO 840129-08-6776 dan oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[2] The accused was 16 years 10 months and 24 days of age at the time of the offence alleged against him on 13 February 2001. He was 19 years four months and 16 days at the time of the trial which commenced on 5 August 2003.

[3] The prosecution introduced evidence through 15 witnesses to testify in support of the charge against the accused and had relied on circumstantial evidence, scientific and medical evidence. As for the scientific and medical evidence, the two chemist, namely, Mr Ng Chang Chai (PW13) and Mr Lim Kong Boon (PW14) and a forensic pathologist, Dr Mohd Shah Bin Mahmud (PW15) had testified on behalf of the prosecution.

[4] As to the circumstantial evidence, the prosecution called En Bakar bin Amin (PW7), the registered owner of motor car No ACE 8971. Basically, his evidence was that the accused had borrowed his motor car from him on 11 February 2001 at or about 1pm and his motor car was not returned to him till 18 April 2001. However, this court found that his evidence as to the

- A** identity of the accused as the person who had borrowed the motor car from PW7 and consequently to implicate him to the crime of the murder is not reliable and safe to accept for the following reasons:
- (i) PW7 has testified that the first time he saw the 'lelaki Melayu' who borrowed his motor car was on 11 February 2001. He did not obtain any personal details of the 'lelaki Melayu' who borrowed his motor car, ie his name, address and particulars of his driving licence. In other words, the 'lelaki Melayu' who borrowed the motor car from PW7 on 11 February 2001 was a complete stranger and was not known to him at all and that was his own admission. He does not know the 'lelaki Melayu' who borrowed his motor car and there was also no details of the person's identity such as his features, mark, age, height, complexion or any other peculiarities which was adduced on behalf of the prosecution before PW7 identified the accused in court other than his evidence that the person was a 'lelaki Melayu';
- B**
- C**
- (ii) the identification of the accused by PW7 in court on 6 August 2003, ie about two years four months later has little evidential value because:
- D**
- (a) the 'lelaki Melayu' who borrowed his motor car on 11 February 2001 was a complete stranger to PW7;
- (b) PW7 did not obtain personal details of the 'lelaki Melayu' who borrowed his motor car and did not testify as to any details or description as to the identity of the 'lelaki Melayu';
- E**
- (c) there is admission by PW7 that he saw the accused at the Magistrate's Court, Tapah on 18 April 2001 when his motor car was returned to him;
- (d) there is admission by PW7 that he had seen the accused at the High Court, Ipoh on or about 28 October 2002 and this was prior to identifying the accused in court on 6 August 2003;
- F**
- (e) PW7 was given the opportunity to see the accused at the Magistrate's Court, Tapah on 18 April 2001 before the case was transferred to the High Court, Ipoh and on or about 28 October 2002 at the High Court, Ipoh prior to the date of trial when the case proceeded on 5 August 2003 and both this occasions were prior to the date when PW7 had identified the accused in court on 6 August 2003;
- G**
- (f) there was no identification parade held to identify the accused as the 'lelaki Melayu' who had borrowed the motor car from PW7 on 11 February 2001 even though the 'lelaki Melayu' who borrowed his motor car was not known at all and was a complete stranger to PW7;
- H**
- (g) there is no evidence from PW7 as to the physical and facial features, like the body built, facial appearance, height or even the estimate age of the 'lelaki Melayu' who borrowed his m/car;
- I**
- (h) there is no evidence adduced on behalf of the prosecution whether there was any information given of the description of the 'lelaki Melayu' who borrowed his motor car to the investigating officer

or to any police officer when PW7 was met by the police and how and under what circumstances was PW7 allowed to see the accused at the Magistrate's Court, Tapah and at the High Court, Ipoh prior to the date of the trial where PW7 had identified the accused in court on 6 August 2003 even though there was no evidence that an identification parade was held for PW7 to identify the person who had borrowed his motor car and since the 'lelaki Melayu' was a complete stranger to him;

- (i) there was no evidence from any of the police officers including the investigating officer whether PW7 had related to any of the police officers that he had seen or identified the accused at the Magistrate's Court, Tapah on 18 April 2001 as the 'lelaki Melayu' who had borrowed his motor car;
- (j) there was no evidence or explanation why PW7 had failed to obtain the name, address, or other personal details or particulars of the identity of the person who had borrowed his motor car even though that person was a complete stranger to him and more so where PW7 has pointed out to the accused in court who is a youth and there was no mention at all of a youth as having borrowed his m/car. Surely PW7 must be able to differentiate between a youth and an adult and he ought to have taken extra precautionary measures to ascertain the personal identification details of a youth where in fact he was a complete stranger to him;
- (k) PW7 did not even state that the 'lelaki Melayu' who had borrowed his motor car on 11 February 2001 was a youth, or a young person and bearing in mind that the accused was 16 years 10 months and 24 days at the time and PW7 had through out the trial maintained that it was a 'lelaki Melayu'. The prosecution had failed and did not even ask or clarify from PW7 whether the 'lelaki Melayu' was an adult or a youth before PW7 was asked to identify the 'lelaki Melayu' in court since the accused was a youth and there was no evidence that the 'lelaki Melayu' was a youth and no identification parade was held to identify the 'lelaki Melayu' who was arrested by the police on 19 February 2001;
- (l) the prosecution did not clarify from PW7 whether he could have still identified the accused in court on 6 August 2003 as the 'lelaki Melayu' who had borrowed his motor car if he did not have the opportunity to see him at the Magistrate's Court, Tapah on 18 April 2001 and or at the High Court, Ipoh on/about 28 October 2002 prior to the date where he identified the accused in court on 6 August 2003 at the trial.

[5] On considering the matters aforesaid, this court finds that the identification of the accused in court on 6 August 2003, ie about two years four months later is not safe to accept. The identification of the accused in court who was a complete stranger to PW7 ought to have been supported by evidence of an identification which was made either at a properly conducted

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- A identification parade or that the 'lelaki Melayu' was personally known to PW7 prior to 11 February 2001 and recognised by him as the person known to him (see *Ismail & Anor v PP* [1967] 1 MLJ 241). Unfortunately, there was no such evidence to show that this was how PW7 had identified the accused in court as the person who had borrowed his motor car other than merely pointing out to the accused in court as it was obvious that there was only one person on trial in court.
- B

- [6] The necessity for holding an identification parade may arise where the accused was not previously known to the witnesses as in the instant case where the 'lelaki Melayu' who had borrowed his motor car was a complete stranger and not known to PW7 (see *Kali Ram v State of HP* AIR 1973 SC 2773 and *Mehtab Singh v State of MP* AIR 1975 SC 274 at p 277).
- C

[7] *Sarkar's Law of Evidence* (15th Ed, 1999) Vol 1 (at pp 209–231) states as follows:

- D It is true that where the identity of the accused is not known to the eye witness it is incumbent upon the Investigating Officer to get such suspect identified from eye-witness in a test identification parade which not only ensures that the eye-witness's memory regarding the identity of the appellant is tested but also ensures that the investigation is proceeding on the right track and the person arrested is the real culprit. ... Where the witness did not know the accused prior to the incident, the failure of prosecution to get accused identified by the witness considerably detracts from the value to be attached to evidence the witness [*SP Tigare v State of Maharashtra* 1997 Cri LJ 157, 161 (Bom-DB)] ... Improvements made by the witness regarding description of the accused and clothes worn by him raise a suspicion regarding the identification of the accused by the witness [*Udai Lal v State of Rajasthan*, 1994 Cri LJ 509, 511 (Raj)].
- E

- F Identification by a witness of an accused who was not known to him, prior to the incident is valueless [*Harsh Naval Misty v State of Gujarat*, (1993) 1 Crimes 451 (Gum)]

- ... Identification of culprits who are not known to him for the first time in court cannot be relied upon in the absence of corroboration by an earlier test identification parade [*Shyamlal Pradhan v State of Orissa*, 1996 Cri LJ 1019, 1020 (Ori); *Kanan & Ors v State of Kerala* AIR 1979 SC 1127] ...
- G

- ... the purpose of identification is to test that evidence and the safe rule is that the sworn testimony of witness in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding.... The exception to this rule of corroboration by an earlier identification is where the court can safely rely on it without previous identification [*S v Maheswar A* 1964 Or 37]
- H

- ... Identification for the first time in court without being tested by a prior identification parade is valueless [*S v VC Shukla A* 1980 SC 1382]. If a witness did not know the accused before the occurrence and no test identification parade was held to test his power of identification and he was also shown by the police before he identified the accused in Court, his evidence becomes absolutely valueless on the question of identification [*Mohanlal Gangaram Gehori v State of Maharashtra A* 1982 SC 839, 842: 1982 Cri LJ 630 (2), *Hari Nath v State of UP A* 1988 SC 345, 348 : 1988 Cri LJ 442].
- I

If there are infirmities in the evidence of eye-witnesses their evidence identifying the accused for the first time in court without a prior test identification parade is of no avail [*Mahadeb Ghosh v State* 1983 Cri LJ 1854, 1858 (Cal) (DB), *Hazrat Ali v State of Assam* 1983 Cri LJ NOC 61 (Gauh); *State of Orissa v Ramesh Chandra Mahapatra* 1983 Cri LJ NOC 191 (Ori) : (1983) 56 Cut LT 60] ...

In a case of day light robbery, if the witness is not able to give the physical features of the accused, his evidence identifying the accused for the first time in court cannot be relied [*Joginder Singh Jaggi v State* 1990 Cri LJ NOC 30 Delhi]. In a case of robbery, the victim identified the accused only in the Court that too after a lapse of four months from the date of occurrence. It is not possible to believe that the victim had no occasion to see the accused in the gap of 4 months [*Mohd Abdul Hafeez v State of Andhra Pradesh* A 1983 SC 367, 368: 1983 Cri LJ 689]. When the facial features of the accused are not mentioned in the FIR and the accused is arrested two months after the occurrence it is absolutely necessary to hold an identification parade [*Yog Raj v State* 1990 Cri LJ (NOC) 80 (Del); *Radha Bhakta v State*, 1984 Cri LJ NOC 22: 1983 Cut LR (Cri) 377 (Ori); *Mohd Abdul Hafeez v The State*, 1984 Cri LJ NOC 75 (AP)].

Value of evidence of identification — In *SC Bahri's* case (A 1994 SC 2420; 1994 Cri LJ 3271) the Supreme Court observed thus:

'It is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned also who was a stranger to the accused because in that event the chances of his memory fading away are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of test identification parade.'

The evidence of identity must be thoroughly scrutinised, giving benefit of all doubt to the accused; but if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not to feel shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification. [*Rameshkumar Soni v State of Madhya Pradesh* 1997 Cri LJ 3418 (MP). See *State of MP v Manka* 1960 MP C216]

In *Asharfi v State* A 1961 All 153: 1961 (1) Cri LJ 340, the Division Bench of the High Court agreed with the above.

Their Lordships agreed with the above observation made by this Court. After mentioning agreement with the above decision of the Division Bench of this

- A** Court it held that 12 questions are apt to arise and must be answered by the Court to its satisfaction before it can accept the evidence. They are as follows:
- (1) Did the identifier know the accused from before?
 - (2) Did he see him between the crime and the test identification?
 - (3) Was there unnecessary delay in the holding of the test?
- B**
- (4) Did the Magistrate take sufficient precautions to ensure that the test was a fair one?
 - (5) What was the state of the prevailing light?
 - (6) What was the condition of the eye-sight of the identifier?
 - (7) What was the state of his mind?
- C**
- (8) What opportunity did he have of seeing the offenders?
 - (9) What were the errors committed by him?
 - (10) Was there anything outstanding in the features or conduct of the accused which impressed him?
- D**
- (11) How did the identifier fare at other test identifications held in respect of the same offence?
 - (12) Was the quantum of identification evidence sufficient?

The prosecution has to adduce link evidence to the effect that right from the arrest till being lodged in jail, the faces of the suspects were kept veiled and no one had opportunity to see them. *Asharfi v State* A 1961 All 153. Plea that the suspect was shown to the witness does not require to be affirmatively established, it is sufficient if the accused can create a reasonable doubt in the mind of the court [*Vilas Vasantrao Patil v Choudhry* 1996 Cri LJ 1854, 1857, 1858 (Bom)].

- E**
- Only one identification cannot eliminate the possibility of the painting out being purely through change and for this reason is insufficient to establish the charge (See *Asharfi v State of UP* A 1961 All 153; 1961 (1) Cri LJ 340).
- F**

Evidence of identification for the first time in court is inherently weak [*Sharaf Shah v S A* 1963 AP 314; *Purna Chandra Sahu v State of Orissa* 1984 Cri LJ 1407, 1409: (1984) 1 Orissa Law Rev 228 (Ori); *Jong Singh v State of Rajasthan*, 1984 Cri LJ 1135, 1138: 1984 Raj LR 19 (Raj)]... *A witness's evidence of identification given in court should only be accepted if he identified the same person, whom he had previously picked out in the identification parade in jail* [*Mahni v R*, 82 IC 280: A 1925 L 137; *Kanan v S A* 1979 SC 1127; *Chandran v State of Kerala* 1986 Cri LJ 1865, 1873 (Ker) (DB)] ...

- G**
- H** Value of identification evidence depends on the effectiveness of the precautions taken against the identifying witnesses having an opportunity of seeing the persons to be identified before the parade and also against being provided with any unfair aid or assistance to facilitate identification [*Hasib v S A* 1972 SC 283]. The proper course for the police to do is to allow the accused to remain in judicial custody till his identification parade is arranged [*Adesh Kumar v State* (1986) Cri LJ 233, 235: (1985) 28 DLT 126 (Del)] ...

- I** In criminal cases certain precautions should be observed: "The witness should not, however, be asked to identify a person for the first time when he is in the dock; the accused should previously be placed with other persons and the witness asked to pick him out [*R v Cartwright* 1914, 10 Cr App R 219]; nor should the witness be asked to identify a prisoner when the prisoner is alone in a room [*R v*

Williams 1912, 8 Cr App R 84], nor should the witness be asked, “Is that the man? [*R v Chapman* 1911, 7 Cr App R 53]; nor allowed to see the prisoner before an identification parade [*R v Dickman* 1910, 5 Cr App R 143]; nor should the suspected person be described to the witness [*R v Bundy* 1910, 5 Cr App R 270; Hals 3rd Ed Vol 10, para 814]. For precaution for concealing the identity of accused prior to parade; see *S v Ranjita* A 1962 Raj 78 FB; *Palaniaswami v SA* 1968 B 127. When the witnesses were asked to wait outside the court at the time the accused were brought to the court for the test identification parade it is quite probable for, the witnesses to have seen the accused before the parade and so the evidence of identification is valueless [*Ghanashyam Das v The State* 1984 Cri LJ 588, 591: (1984) 1 Crimes 845 (Ori)]. If before the identification parade is held, the accused were taken to the court from the jail a number of times and the witnesses had an opportunity of seeing the accused to be identified, it is enough to vitiate the identification parade [*Govinda Pradhan v State* 1991 Cri LJ 269, 272 (Ori); *State v Pravakar Behera* 1991 Cri LJ 745, 746 (Ori); *Bhullen v State* 1981 Cri LJ NOC 93 (All): 1981 All Cri R 208; *Md Rosan v The State* 1984 Cri LJ NOC 85: (1984) 1 Crimes 838 (Ori)] ...

... Mere evidence of identification for the first time in court is not sufficient to sustain the conviction of the accused [*Ramzan v State of Maharastra* 1998 Cri LJ 3547, 3548 (Bom)]. No conviction can be based on identification for the first time in court and that too by a solitary witness. [*Robert Peter Kadam v State of Maharashtra* 1998 Cri LJ 3879, 3881 (Bom)].

Where there was clear evidence to show that the accused persons were shown to the witnesses, the identification of such accused by the witnesses in the Court was held to be meaningless [*Shaikh Umar Ahmed Shaikh v State of Maharashtra* 1998 Cri LJ 2534 (SC)].

Where there was no other evidence against the accused except identification, the court said that there is need for caution in a case where the evidence depended solely on identification evidence. The judge also noted the danger of relying on dock (in court) identification in the light of the failure of the prosecution in holding TI. parade. [*Williams v R* [1997] 1 WLR 548 (PC)]. (Emphasis added.)

[8] In *Lee Lian & Ors v PP* [1956] MLJ 191, the appellants were convicted on a charge of house trespass in order to voluntarily causing hurt to certain persons in contravention of s 451 of the Penal Code. In quashing the conviction of the second and third appellants, his Lordship Thomson J (as he then was) said:

... As regards the second and third appellants the whole case turned on the question of their identity and I am not prepared to say that had the evidence in question been excluded as it should have been the learned Magistrate would have come to the conclusion that they were guilty. Their appeals are therefore allowed and their convictions quashed.

(Emphasis added.)

[9] In *The People (at the Suit of the Attorney General) v Dominic Casey (No 2)* (1) 1962 IR 33, Kingsmill Moore J for the Supreme Court said:

The necessity of giving a special direction where identification rests on the evidence of only one witness has already been judicially recognised

- A** We are of the opinion that juries as a whole may not be fully aware of the dangers involved in visual identification nor of the considerable number of cases in which such identification has been proved to be erroneous and also that they may be inclined to attribute too much probative effect to the test of an identification parade. In our opinion it is desirable that in all cases, where the verdict depends substantially on the correctness of an identification their attention should be called
- B** in general terms to the fact that in a number of instances such identification has proved erroneous, to the possibilities of mistake in the case before them and to the necessity of caution. Nor do we think that such warning should be confined to cases where the identification is that of only one witness. Experience has shown that mistakes can occur where two or more witnesses have made positive identifications. We consider juries in cases where the correctness of an identification is challenged
- C** should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous;
- D** and accordingly that they should be specially cautious before accepting such evidence of identification as correct; but that if after careful examination of such evidence in the light of all the circumstances, and with due regard to all the other evidence in the case, they feel satisfied beyond reasonable doubt of the correctness of the identification they are at liberty to act upon it.
- E** In the case which has been referred to us a finding of the guilt of the accused depends substantially if not entirely on the acceptance of the identification by two witnesses, neither of whom had any previous acquaintance with the prisoner ...
- [10]** In *Mahinder Singh v Public Prosecutor* [1967] 1 MLJ 126 at p 127, HT Ong FJ (as he then was) observed that:
- F** ... It was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed. We have therefore, taken into consideration the complainant's answers elicited in cross-examination, which were undoubtedly material but which the judge had failed to take into account.
- G** **[11]** In *KS Roberts v PP* [1970] 2 MLJ 137 (HC), one of the questions raised at the appeal was the identification of the appellant. Raja Azlan Shah J (as his Highness then was) at p 138 said:
- H** Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word 'proved' given in section 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required
- I** but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credulity do not go together.

[12] In *Arthurs v Attorney-General for Northern Ireland* [1971] 55 Cr App R 161 at p 168, Lord Morris of Borth-y-Gest of the House of Lords observed with the concurrence of the other members:

Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing up would be deficient if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however, greatly differ. Thus *there may be cases in which a witness can say that at a certain place and time he saw and clearly recognised the accused person. If the accused person was someone who was well known to him or at least was well known to him by sight and if the conditions at the relevant time were such that there was nothing to impede or to prevent recognition or to make recognition difficult, then a jury would mainly have to consider whether the witness was both truthful and dependable. In the present case the police constable knew the accused well. There was no dispute as to that.* It was for the jury to decide not only whether the police constable was a truthful witness but also whether the conditions which existed at the time when the police constable claimed to have seen and recognised the accused were such that a mistake might have been made..... There will, however, be some cases where the situation is very different. I refer to cases *where a witness has seen someone whom he does not in any way know and has had over a period of time to carry in his mind's eye a recollection of the person and then is at some later date asked (either at an identification parade or at some place) to say whether he can recognise the person whom he previously saw. In such a situation it is manifest that dangers may result from human fallibility.* I would leave for future consideration the question whether there is need to lay down any rule for the guidance of courts in such cases

(Emphasis added.)

[13] In *Rangapula & Anor v Public Prosecutor* [1982] 1 MLJ 91 at pp 93 and 95, Yusof Abdul Rashid J said:

... Where the evidence of identity is poor then there is a need for supporting evidence as to the identification of an accused.

... It is not enough for the learned President to believe PW4 regarding the identification of the appellants just because PW4 had known the appellants for quite a considerable length of time. At the material day and time, he was able to see the appellants in a flash. As Lord Widgery CJ said the English Court of Appeal case of *R v Turnbull & Ors* at p 552:

‘... even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.’

On the above grounds I would allow the appeal and set aside the conviction and sentence.

[14] In *Dato' Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232 at p 261, Hashim Yeop A Sani J (as he then was) drew a distinction between recognition and identification which is as follows:

... it is important in my opinion to draw a distinction between recognition and identification. Recognition is more reliable than mere identification. Recognition of a person known to a witness would be more reliable than identification by a witness of a stranger.

- A [15] In *Heng Aik Ren Thomas v Public Prosecutor* [1998] 3 SLR 465 at pp475–476, Karthigesu JA said:

In adapting the *Turnbull guidelines* for our local system, we have reworked the *Turnbull guidelines* into the *following three step test*. The *first question* which a judge should ask when encountering a case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken.

- B
- C If so, the *second question* should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, *the presence of obstruction in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the actual appearance of the accused*. In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If the evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence.

- D
- E Where the quality of the identification evidence is poor, the judge should go on to ask the *third question*. Is there any other evidence which goes to support the correctness of the identification. *If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies on such poor identification would be unsafe*. The supporting evidence need not be corroborative evidence of the kind required in *R v Baskerville* [1916] 2 KB 658. *What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification*.

- F (Emphasis added.)

- G [16] On the other hand, in *Maidin Pitchay & Anor v Public Prosecutor* [1968] 1 MLJ 82, two police constables PW3 and PW 6 had kept the first appellant under surveillance for 14 days and he was detained while in the act of conveying passengers. The first appellant was also seen by the police to have been using the same car for all 60 trips of conveyance of passengers of different origins. The first appellant was convicted by the Magistrate's Court, Parit Buntar for offences under ss 92(1) and 74(1) of the Road Traffic Ordinance 1958 namely, for using a motor vehicle as a public service vehicle without a valid licence and using the said vehicle without there being in force a policy of insurance in respect of third party risks in contravention of the aforesaid provisions of law. The appellants appealed to the High Court against the conviction. One of the grounds of appeal was that no identification parade was held for the purpose of identifying the first appellant as the person seen by police constables PW3 and PW6 conveying passengers. In dismissing the appeal against conviction his Lordship MacIntyre J held that:

I I find little or no substance in the grounds urged in support of the contention that the convictions are against the weight of evidence. An identification parade is held

when there is some doubt as to the identity of the person who is alleged to have committed the offence with which he is charged

[17] In *Shand v R* [1996] 1 All ER 511 at p 512, the appellant was charged, convicted and sentenced to death on 28 April 1987 of murdering Dudley's Campbell by the Circuit Court Jamaica. He was identified as the murderer by two witnesses who knew him and who had seen him at different stages of the incident, independently in daylight at close quarters. The appellant's application for leave to appeal was refused by the Court of Appeal on 15 February 1988. He then appealed against that decision by special leave of Her Majesty's Privy Council.

The evidence of the two eye-witnesses were briefly as follows:

The appellant, known as Duppy, was identified as the murderer by two witnesses. The first witness was Sonia Simmonds, who had known the appellant for over four years, seeing him sometimes twice a week at a shop in Mountain View where the appellant lived. On the day of the murder she was standing at a bus stop which was next door to a shop. Four young men including the deceased and one Philip Daley the second witness went into the shop. She followed them into the shop. Subsequently she came out onto a piazza where she saw a man jump over a wall onto the piazza and come towards her. He had a short gun in his hand and she called out to the men in the shop: 'Duppy ah come', at a time when he was about 18 feet from her. The second witness ran out of the shop and she then heard an explosion. The second witness held his side, spinning in the road. At the time of the explosion the appellant was about four feet from her. The deceased then ran out of the shop. When he was facing the appellant the latter had the gun in his hand and she heard three explosions. The deceased ran into the street and she saw him lying in front of the piazza. She did not see the appellant again. She did not see anyone else with a gun. Her evidence was challenged solely on the basis that she was not at the shop at all when the deceased was killed and that her whole story was a lie.

The second witness to identify the appellant was Philip Daley, who had been shot. He said that he had known the appellant for five years, though the latter said that as they had been brought up in the same area they had known each other longer, for around 12 years. When he was at the shop door the appellant came through the lane beside the shop with a gun. He was about ten yards away when the second witness first saw him. He ran down the road when he heard an explosion like a gun shot and felt something hit him in the back and pass through his body. He staggered into the lane, hearing three more shots. When he stopped he looked over his shoulder to see the appellant on the piazza. He was then taken to hospital. Again his evidence was challenged on the basis that he did not see the appellant that morning. He denied this: 'Five years I know him if him turn back way a know him, sideways a know him, him face a know him, is him.'

The first ground of appeal is that the trial judge failed to give a warning to the jury about the identification evidence in accordance with the guidelines set out in *R v Turnbull* [1976] 3 All ER 549 at pp 551-552.

[18] In dismissing the appeal, their Lordships found that on the facts in that case the evidence of identification also was exceptionally good. Lord Slynn of Hadley who delivered the judgment of the Privy Council said:

- A** ... The appellant accepted that he had known both witnesses for a long time (indeed, as already pointed out, he said that he had known Daley for much longer than Daley said that they had known each other). The identification took place in daylight and both witnesses saw the appellant at close quarters. Sonia Simmonds reaction was immediate when she saw the gunman: 'Duppy ah come'. Daley left quickly, no doubt because of past disputes, fearing danger because it was the appellant with a gun.
- B** There is nothing to suggest that these witnesses who saw the appellant at different stages and independently and identified him without any doubt were mistaken or that they possibly could have been mistaken.

[19] In *Kanan & Ors v State of Kerala* AIR 1979 SC 1127 at p 1128, Fazal Ali J for the Supreme Court said:

- C** It is well settled that where a witness identify an accused who is not known to him in the court for the first time, his evidence is absolutely valueless unless there have been a previous TI parade to test his powers of observations. The idea of holding TI parade under s 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no TI parade is held, then it would be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in court. In this circumstances, therefore, we feel it was incumbent on the prosecution to have arrange TI parade and get the identification made before the witness was called to identify the appellant in the court. On this ground alone, the evidence of PW25 becomes unworthy of credence and must be excluded from consideration.
- D**
- E** [20] In view of the above infirmities and since the 'lelaki Melayu' was a complete stranger to PW7, this court is unable to accept the identification of the accused in court on 6 August 2003 to confirm that the accused was the 'lelaki Melayu' who had borrowed the motor car from PW7 on 11 February 2001. There is also evidence that PW7 had the opportunity to see the accused at the Magistrate's Court, Tapah on 18 April 2001 and the High Court, Ipoh on or about 28 October 2002. As was found by this court, there is no evidence under what circumstances did PW7 get to see the accused. Further, there is no evidence as to whether PW7 had informed the investigating officer or any police officer that he had seen or identified the accused at the Magistrate's Court, Tapah on 18 April 2001 and he was the 'lelaki Melayu' who had borrowed his motor car on 11 February 2001. There is absolutely no evidence from PW7 or any of the police officers as to the physical and facial features or description of this 'lelaki Melayu' who PW7 had referred to throughout his testimony in court or any evidence that the 'lelaki Melayu' was in fact a youth which the prosecution had failed in their duty to assist the court to show at least that the 'lelaki Melayu' whom PW7 had referred was in fact a youth (see *Jaafar bin Ali v PP* [1998] 4 MLJ 406 at p 417). On the other hand and even if the identification of the accused by PW7 in court is accepted as reliable and safe, this evidence by itself does not mean or support that the accused was the last person who had driven PW7's motorcar together with the deceased on or just before the deceased was murdered. The only evidence to implicate the accused with the motorcar is when PW5 had seen him a day prior to 13 February 2001 where the accused, PW5 and the deceased had a meal at the Kentucky Fried Chicken Restaurant at Tapah.
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Where Prosecution Leads Two Sets of Evidence, each one of which Contradicts the other

[21] PW8 who is the mother of the deceased had lodged a police report on 13 February 2001 at 11.05pm. at the Balai Polis Tapah that the deceased who went out from home at or about 2.30pm has not since returned. In her police report exh P10, PW8 has stated that she was informed by the deceased's younger sister (PW5) that the deceased had gone out in motorcar No ACE 8971 with 'seorang lelaki yang tak dikenali'. As this part of the evidence is material to determine with whom the deceased had gone out on 13 February 2001 at or about 2.30pm., this court would refer to the police report of PW8 in verbatim for the sake of clarity:

Saya ibu kepada anak perempuan saya Farrah Deebe bte Rustam telah keluar rumah pada pukul 2.30 petang alasan yang beri pergi makan di Pekan Tapah hanya sekejap — hingga sekarang tak balik lagi. Tak pernah terjadi perkara seperti ini. Ini pertama kali saya difahamkan adiknya Shigim Isma memberitahu kereta Aeroback Iswara Biru Muda Plet ACE 8971 yang dinaiki kakaknya *bersama seorang lelaki yang tak dikenali*. Umur anak saya 17 tahun KPT: 840129-08-6776. Sekian lapuran saya.

[22] On the other hand, the deceased's younger sister (PW5) has testified in court on 5 August 2003 that the deceased went out with the accused on 13 February 2001 at about 2.30pm whereby the prosecution has introduced two sets of evidence which contradicts each other on a material and crucial fact to determine with whom the deceased had gone out on 13 February 2001 at 2.30pm. This piece of circumstantial evidence is crucial to consider if the accused could be implicated with the crime of murder.

[23] This court finds that the learned deputy public prosecutor had failed in her duty to clarify from PW5 as to why she had informed her mother PW8 that the deceased had gone out with an unknown person (seorang lelaki yang tak dikenali) and not the accused when in fact PW5 had known the accused and his name, where she and the deceased had a meal with the accused a day before 13 February 2001. The evidence of PW5 in court after about two years and six months that she had seen the deceased going out with the accused on 13 February 2001 at or about 2.30pm cannot be ruled out as an afterthought or an improvement so as to link the accused who is charged with the crime of murder of her sister, the deceased. This court also finds that it is strange why PW5 had not informed her mother (PW8) of this fact that the deceased had gone out with the accused even at the time when PW8 had made inquiries regarding the whereabouts of the deceased and the family members were looking for the deceased when she did not return home. At that time, PW8 had told PW5 to make inquiries from her friends of the whereabouts of the deceased and not a word was mentioned about the accused by PW5 before the matter was reported to the police or even at the time when the report was lodged by PW8. In this respect, the evidence of PW5 in court has to be scrutinized with care as there was absolutely no explanation at all or clarification sought by the prosecution for this material discrepancy or gap on a very crucial piece of evidence as to why PW5 did not inform PW8 that the person who had gone out with the deceased on

A 13February 2001 at or about 2.30pm was the accused since the prosecution was gathering or introducing ‘jigsaw evidence’ with the view to build a strong foundation for the circumstantial evidence to link the accused with the crime of murder.

B [24] In *Harchand Singh v State of Haryan* AIR 1974 SC 344 at p 347, Khanna J observed:

C The other eye witness, upon whose testimony reliance has been placed by the prosecution, is Ram Asra (PW14). So far as this witness is concerned, we find that his presence at the scene of occurrence was not mentioned by Ajaib Singh deceased in the dying declaration which was recorded by ASI Harbhajan Singh at Khanna hospital. According to Ram Asra, he was working with the deceased at the well when the three accused came there and assaulted the deceased. If Ram Asra was, in fact, present and working with Ajaib Singh deceased at the time of the occurrence, it is not clear as to why the deceased should fail to mention that fact in the dying declaration. The evidence of Amarjit Singh, Mal Singh and Teja Singh upon which also the prosecution placed reliance goes to show that Ram Asra had not witnessed the occurrence. The name of Ram Asra was in the very nature of things not mentioned in the first information report, because the said report was based upon the dying declaration of Ajaib Singh. It would thus appear that the eye-witness upon whose testimony the prosecution wants to sustain the conviction of the appellants is shown to be an unreliable witness by the other evidence produced by the prosecution. The present is a case wherein one set of prosecution evidence condemns the other set of evidence produced by the prosecution. In the above state of affairs, we find it difficult to secure a firm ground upon which to base the conviction of the accused appellants.

E The function of the court in a criminal trial is to find whether the person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged. *If in a case the prosecution leads two sets of evidence, each one of which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.*

F **G** (Emphasis added.)

(see *Public Prosecutor v Lee Eng Kooi* [1993] 2 MLJ 332 at pp 333–334)

H [25] In the instant case, there was no reason or explanation advanced on behalf of the prosecution as to why there is two sets of evidence on this very crucial aspect of the case. By introducing the police report exh P10 through PW8 which contradicts the evidence of PW5, the prosecution case itself has created a material doubt in their case as to whether the deceased went out with the accused, a youth or with an adult or someone else on 13 February 2001 at or about 2.30pm. In view of this inconsistency and material contradictions, this court finds that this part of the circumstantial evidence which the prosecution had introduced with a view to implicate the accused has shed other reasonable possibility or explanation and does not irresistibly point to one direction as to the guilt of the accused or even to implicate the accused.

Consequently, this court finds that the prosecution in the instant case had introduced two sets of evidence which are contradictory to each other as to whether the deceased had gone out with the accused or with someone else who was an unknown person and this leaves more than one inference which is reasonably possible. In the circumstances, the evidence most favourable to the accused should be adopted where there is a doubt whether the deceased had gone out with the accused on that date.

[26] In the circumstances, the inference which can be drawn from the two sets of facts in favour of the accused is that the deceased had not gone out with the accused on 13 February 2001 at or about 2.30pm but with someone unknown to PW5 notwithstanding the fact that she has mentioned the registration number of the motor car and the model of the motor car which belongs to PW7. At this stage, it is important to observe that there is no evidence that an identification parade was held for PW5 to identify the accused as the person who had gone out with the deceased from the home of PW5 on 13 February 2001 at or about 2.30pm especially so when PW8 in her police report exh P10 has stated that she was informed by PW5 that the deceased had gone out with 'seorang lelaki yang tidak dikenali.' In view of this discrepancy and inconsistency between the evidence of PW5 and PW8 on a crucial piece of circumstantial evidence, it is not only prudent but a necessity for the investigation agency to have held an identification parade for PW5 to identify the 'lelaki yang tidak dikenali' where the deceased was supposed to have gone out on that date.

[27] In *Tai Chai Keh v Public Prosecutor* (1948–49) MLJ Supp 105 at p 108, his Lordship Laville J said:

... Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

[28] In *Phoon Liat Sum v Public Prosecutor* [1950] MLJ 205, his Lordship Hill J in allowing the appeal of the accused against his conviction and sentence said:

... some of the evidence on which they were based was capable of a construction equally in favour of the accused.

I feel, therefore, though I confess with some hesitation, that there was a doubt in this case, the benefit of which it would have been safer to give to the appellant.

[29] In *Mehtab Singh v State of MP* AIR 1975 SC 274, the fourth appellant was acquitted and discharged by the sessions court of the offence under ss147 and 302 read with s 149 of the Indian Penal Code. On appeal by the State, the High Court, reversed the order of acquittal and convicted the fourth appellant of the offence under ss 147 and 304 Part II read with s 149 of the Indian Penal Code. The fourth appellant with special leave, then appealed to the Supreme Court. In delivering the judgment of the Supreme Court, Bhagwati J (as he then was) restored the order of acquittal of the Sessions Court upon the fourth appellant and said:

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- A** The law is now well settled that where two views of the evidence are reasonably possible, the appellate court ought not to disturb a finding of acquittal. There are numerous decision of this court laying down this proposition. (see *Ram Jag v State of Uttar Pradesh* AIR 1974 SC 606)

- B** [30] This court found that the chain of circumstantial evidence adduced on behalf of the prosecution was incomplete and leaves reasonable grounds wholly inconsistent with the guilt of the accused. On the other hand, even if there is reliable evidence that the deceased was last seen with the accused that by itself is not sufficient evidence to establish the guilt of the accused (see *Inderjeet Singh v State of Punjab* AIR 1991 SC 1674).

- C** [31] As to the items recovered as contained in exh P11 in Room No 3 at No 173, Jalan Pasir Bogak, Pulau Pangkor on 19 February 2001 by Chief Insp E Raman @ Abd Rahman bin Din (PW9), this court is of the view that there is no admissible evidence as to who was the owner or the occupier of the said house or the said Room No 3. In other words, there was no admissible evidence of ownership of the items recovered in order to implicate or link the accused to the exhibits other than the bare evidence of PW9 that those items belonged to the accused. There is no evidence to link the accused with the items recovered by PW9 other than his evidence that he took the accused from Disco Coral Bay to the address at No 173, Jalan Pasir Bogak, Pulau Pangkor on 19 February 2001. There is no evidence at all from any of the witnesses for the prosecution as to who was the owner of the house or occupier or who was in possession of either the room or the house on 19 February 2001 or prior to 19 February 2001. There is no evidence whether the house and the room had remained open, closed or locked at the time when PW9 entered the house and recovered the said items from the room and this has not been disclosed to the court. There is no evidence as to who opened the door to the house and/or the room. There is no evidence if there was any personal belonging of the accused such as any document that were found in the room or house to link the accused. Accessibility of others to the room or to the house has not been eliminated by the prosecution. The same observation would apply to the items recovered by Chief Insp Hasnul Affandi bin Mohd Saleh (PW10) on 20 February 2001 as in exh P12 (see *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230 and *Public Prosecutor v Liew Sam Seong* [1982] 1 MLJ 223).

- H** [32] On the other hand, even if the exhibits which were recovered from Room No 3 at No 173, Jalan Pasir Bogak, Pulau Pangkor is found to belong to the accused, the prosecution had failed to show the nexus of the sample of blood labelled on the envelope in the name of the deceased and the accused as belonging to both the deceased and the accused as there was no evidence from whom and who took the sample of blood so as to link the blood on the items recovered in exhs P11 and P12. The label attached to the envelope cannot in law conclude that the sample of blood belong to the deceased and the accused unless there is direct evidence that the sample of blood was in fact taken from the body of the deceased or the accused.

[33] In *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148 at p 151, Mohamed Azmi SCJ said:

... It seems clear from the evidence that the whole complex including the store room occupied by the accused were accessible to others including the caretakers. In our view, the failure to put this matter clearly to the jury for their consideration is a major flaw in the summing up of the learned judge when dealing with the various circumstantial evidence. Merely stating that the accused was staying in close proximity with the place where the deceased was found without mentioning the accessibility of the place to others would certainly give the impression that only the accused and no one else had access to the building and this would clearly be a misdirection. There was no motive for the killing and the jury ought in the circumstances to have been asked expressly to consider whether anyone else who had access to the complex could have committed the crime. The learned judge merely pointed out that the murder weapon P6 and the newspapers were found in the store area of the building and that the door to the store area was not locked, without stating what inference could be drawn from such fact. Again, the learned judge merely pointed out that the cardboard sleeve to the chopper was found on a table in the accused's room on the second visit by Inspector Soh to the scene of the crime, but the jury was not told what inference could be drawn from the fact that if the incriminating sleeve had been there on the table all the time, why was it not seized at the time of the accused's arrest? Why was it found only subsequently on a second visit, especially when the accused's room was never locked between the arrest and the discovery?

[34] Further, this court is of the view that any response which came from the accused to the question from PW9 or any police officer that the accused lives at the said address is not admissible evidence unless there was evidence that caution was administered to the accused under s 113 of the Criminal Procedure Code after his arrest. In the instant case, there was no evidence of any such caution having been administered to the accused.

Blood samples

[35] It cannot be denied that one of the most common clues found at the scene of a violent crime is blood which can also be found on the victim or the assailant so as to link the suspect to the scene of crime or the victim. It follows that the nature and the identity of the blood stain are of great assistance to the investigation agency in the construction of the crime. In order to obtain the identity of the blood stain a number of serological techniques are carried out and the duration of the blood stain is also relatively important to determine the identification. In order to detect the blood stain, forensic assistance is required. In the instant case, based on the evidence presented by the prosecution, this court finds that the prosecution had failed to adduce evidence that the envelopes marked A1 which contains samples of blood and labelled as 'Farrah Deebea bte Rustam', deceased and the envelope marked A2 and labelled as 'Sayed Mohd Faysal', the accused are in fact samples of blood taken from the body of the deceased and the accused respectively. Consequently, there is a material gap and break in the chain of evidence which was an important piece of evidence to support the circumstantial evidence upon which the prosecution was relying on. There is no evidence as to who took the sample of blood, when, where and from whom. The only evidence that the prosecution

- A** has adduced in so far as the sample of blood is concerned is from the investigating officer, ASP Hasadid bin A Hamid (PW12) who has stated that he had received from Dr Mohd Shah (PW15) several items which PW12 believes can assist in the investigation, namely: (i) fingernail clippings of the deceased, (ii) blood of the deceased, (iii) sample of spermatozoa of deceased, (iv) bra, (v) pubic hair of deceased, (vi) several strands of hair of deceased.
- B** PW12 has also stated that he marked the items on the envelope which was given to him as ABCDEF. There is also no evidence who took and when were the nail clippings taken from the left and right hand of the deceased other than the evidence of PW13 where in his report exh P18 it is stated that he received an envelope marked C on 22 February 2001 with the name of the deceased on the label from the investigating officer (PW12).

C [36] In *Eng Sin v PP* [1974] 2 MLJ 168, the appellant was convicted for a charge of murder by the High Court and sentenced to death. On appeal by the accused, the Federal Court allowed the appeal, quashed the conviction and sentence. In that case, there was no direct evidence to show that the accused had attacked the deceased but however the prosecution relied on circumstantial evidence. In delivering the judgment of the Federal Court, Gill CJ observed that the accused should have been acquitted at the close of the prosecution case. In that case there was an issue as to the proof of the sample of blood. Gill CJ said:

- E** The jury were invited to give 'very careful attention and consideration to the Chemist's Report. Blood was found on the knife which corresponded to deceased's blood grouping — also blood on jacket, shirt, trousers of accused belonged to same blood group as blood on deceased's shirt, singlet, underpants and trousers.' But in a case such as this, where the charge is murder and the evidence entirely circumstantial, the links in the chain of evidence must be strictly established. (see *Fazal Din v Public Prosecutor*.) The Chemist's Report referred to two small bottles containing samples of blood alleged to be those of deceased and the appellant. P21 alleged to be deceased's blood sample and labelled 'Chan Sow Peng' was not so labelled and turned out not to be a small bottle but a large cigarette tin with some liquid in it. The evidence was wholly unsatisfactory in other respects. The doctor who took the specimen of deceased's blood gave no direct testimony that she did so, or how she dealt with it after having done so. Dr Liew's report mentioned 'Specimen of blood handed over to Police.' The OCPD said 'I took a sample of blood of the deceased.' He also said that he took the accused's blood sample on 22 February 1973. It is clear that no reliance can be placed on the Chemist's Report by reason of the failure to adduce evidence that the blood samples were those of the appellant and the deceased by calling the persons *who actually took them* and how they were sealed and labelled by them and to whom they were handed after doing so. There was no evidence as to ownership of the knife, the shirt and the other pair of slippers. No witness saw the Vespa near or at the scene. There was therefore nothing at this stage to connect the appellant with the death of the deceased (Emphasis added).
- F**
- G**
- H**

I [37] According to the chemist report exh P18, PW13 has also stated that he has also received on 1 March 2001 from En Khairil Anuar bin Abdul Aziz an envelope marked A and which contains a tube of specimen of blood with the accused's name on the label. There is no evidence at all who is this chemist En Khairul Anuar bin Abdul Aziz as stated in exh P18 and how he is involved in the instant case. There is no evidence as to what role En Khairul Anuar bin

Abdul Aziz has in the instant case and how and where he had obtained the sample of blood and from whom he had received the sample of blood as contained in the envelope. In *Abdullah Zawawi v Public Prosecution* [1985] 2 MLJ 16, Salleh Abas LP said:

The practice of making available a witness or witnesses from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often-quoted presumption of adverse inference under s 114 (g) of the Evidence Act. But *where the prosecution evidence falls short of proving a prima facie case at the end of its case, the right not to call such witness/witnesses and to make him/them available to the defence will be of no avail. If the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap.* It is not for the defence to call the offered witness/witnesses to supplement the prosecution case.

(Emphasis added.)

[38] This court finds that there is no evidence either from PW13 or PW14 as to whether they have any personal knowledge that the sample of blood that was handed to them were taken from the deceased or the accused other than relying on the label on the envelopes with the name of the deceased and the accused. This court is of the view that the label on the envelopes which has the name of the deceased and the accused has little legal significance to show proof that the sample of blood belongs to the deceased and the accused unless there is direct evidence that the sample of blood was in fact taken from the deceased and the accused where in the instant case, there is no such admissible evidence. There is no evidence that the sample of blood which was tested by PW13 and PW14 belonged to the deceased and the accused other than relying on the label on the envelopes which has the name of the deceased and the accused.

[39] This court is also of the view that the sample of blood which was handled by PW13 and PW14 and the chemist, En Khairul Anuar Bin Abdul Aziz as stated in exh P18 is such an important piece of evidence for the prosecution case if the prosecution had intended to link the accused to the crime of murder of the deceased but the prosecution had once again failed in their duty to close this material gap as aforesaid. In fact the learned deputy public prosecutor had conceded during her submissions that there is no evidence as to who took the sample of blood and from whom except the fact that the investigating officer, PW12 has labelled the envelopes with the name of the accused and deceased. This court found that the entire case of the prosecution was so unsatisfactory and unreliable to such an extent that it has left several material gaps which has created doubt in favour of the accused and the root cause of these infirmities and unsatisfactory features in the instant case is the lack of seriousness shown in the conduct of the prosecution in a case where the charge contains a serious offence against the accused and if it was a considered public interest case.

[40] In *Teoh Hoe Chye v Public Prosecutor; Yeap Theong Tean v Public Prosecutor* [1987] 1 MLJ 220 at pp 229–230, Abdul Hamid CJ for the Supreme Court said:

A A very vital link in the prosecution case seems to be missing. The point was, in our view, rightly taken by counsel for both the appellants when they contended that there was a serious break in the chain of evidence affecting proof as to the identity of the exhibits. It is a question of proof whether in fact the exhibits produced were the exhibits that were seized, handed over to Supt Lum and returned by him to Supt Low and then kept by the latter under lock and key until they were produced in court.

B ... Insofar as the trial court is concerned, its duty is essentially to decide whether on the evidence before it the prosecution has proved its case, and if there are unsatisfactory features in the prosecution case to determine whether, in the light of such features, the prosecution case fell short of proof beyond reasonable doubt (*Abdullah Zawawi's* case).

C We would observe at this point that the law is clear that 'it is unnecessary to call evidence to ensure there is no break in the chain of evidence.' (*Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75.). But *where a doubt as to the identity of an exhibit arises, a failure to adduce evidence to provide the necessary link in the chain of evidence would be fatal to the prosecution case. In the instant case there was such a failure.* (Emphasis added.)

D ... In our view, it was clear that in the particular circumstances of this case.... had caused a serious break in the chain of evidence relating to the identity of the exhibits.

E The break was so serious that we do not think there is any statutory cure. We would add that any attempt in such a case to apply the provisions of s 60(1) of the Courts of Judicature Act 1964, would amount to a relaxation of the law of criminal procedure to such an extent as to deprive an accused person of his right. In this regard, it behoves us to reiterate that "the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else and therefore the appeal must be allowed and the conviction quashed. (see *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116).

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DNA Analysis

G [41] As to the evidence of the chemist (PW14) who carried out the DNA test, this court finds that that piece of evidence is so vital and will become significant if there was evidence that the accused was found near the place of murder of the deceased at the time the murder took place or to link the accused with the murder if there was other reliable and sufficient circumstantial evidence so as to link the accused with the crime of murder. DNA is the abbreviation for deoxyribonucleic acid which is contained in the nucleus of cells in chromosomes in the human body (see *R v Noll* [1999] 3 VR 704).

H In case where DNA evidence is relied on by the prosecution, the function of the court is to assess the DNA evidence together with all other non-statistical evidence, that is the scientific evidence with the relevant and admissible non-scientific evidence. Nevertheless, it is important to observe at this stage that DNA profiling even if accepted by the court merely establishes that the suspect could be the offender and not that he or she is the offender (see *R v Milat* [1996] 87 A Crim R 446). DNA profiling evidence is a developing field of the law of evidence and this court has to examine closely whether the scientific techniques in analysing forensic samples in a particular case is

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sufficiently developed to support the evidence, in the instant case, the evidence of PW 14 with a reasonable degree of reliability. In any event, it is to be observed that DNA evidence only 'leads to draw an inference, the weight and value of the evidence still remain within the domain of the trier of fact in our system, the court.' Nevertheless, while the admission of DNA evidence is recognised in this jurisdiction, it does not speak as to a fact but it is only an incriminating piece of evidence and the DNA profiling establishes no more than that the suspect could be the offender, not that he or she is the offender. It merely tends to show or possibly link a suspect with the crime scene or with the victim by other circumstantial evidence in a criminal trial so as to implicate the suspect or the person charged in court. It is also relevant to establish the identity of the perpetrator of the crime and support other relevant evidence. In some cases DNA evidence may tend to exonerate a suspect to a crime or in a criminal case bearing in mind that in some cases, DNA profiling can be infallible. (see [1994] Crim LR 711)

[42] In the instant case, since the circumstantial evidence adduced by the prosecution does not irresistibly point to the accused as found by this court, the evidence of the DNA test if considered in isolation does not assist the prosecution to connect the accused with the crime unless the DNA test is applied to support the circumstantial evidence and provided the circumstantial evidence points irresistibly only to the guilt of the accused.

[43] As to the evidence of the chemist, Mr Ng Chang Chai (PW13), he has stated in his chemist report dated 16 March 2001 exh P 18 that on 22 February 2001 at 12.38pm, he has received from ASP Hasadid bin A Hamid (PW12) the following items:

- (i) 11 envelopes marked A B G–O and sealed Polis DiRaja Malaysia 104.
- (ii) four envelopes marked C–F and sealed Hospital Daerah, Tapah Sulit (P) and
- (iii) a motor car Proton Saga 12V metallic grayish blue in colour and number plate ACE 8671.

[44] The chemist (PW13) then examined the envelopes marked A, B and C and on analysis found in (as per the chemist report exh P 18):

Envelope A: one bottle labelled 'Farrah Deebea bte Rustam' and sealed 'Hospital Daerah Tapah Sulit (P)' containing one group AB blood specimen. A specimen bloodstain was prepared from this blood specimen for DNA analysis and then placed the specimen bloodstain in an envelope marked as 'A(1)'.

Envelope B: one bottle labelled 'Farrah Deebea bte Rustam' and sealed 'Hospital Daerah Tapah Sulit (P)' containing one blood specimen which I found to contain 49 milligrams of ethyl alcohol per 100 milliliters of blood;

Envelope C:

- (i) one plastic packet containing one paper packet labelled 'Farrah Deebea bte Rustam' having five pieces of right fingernail clippings. I found one of the fingernail clippings to bear one strand of dark blue cotton fibre similar colour to the cotton fibres of the short pants in envelope 'H' and the jeans in envelope 'O'.

A After examination he returned this fingernail clippings and the isolated fibre in a separate plastic packet marked as 'C(A)'.

- (ii) one plastic packet containing one paper packet labelled 'Farrah Deebea bte Rustam' having five pieces of left fingernail clippings. He found one of the fingernail clipping to bear two strands of dark blue cotton fibres similar in colour to the cotton fibres of the short pants in envelope 'H' and the jeans in envelope 'O'.

B After examination he returned this fingernail clippings and the isolated fibres in a separate plastic packet marked as 'C(B)'.

Envelope D: one plastic packet containing one paper packet labelled 'Farrah Deebea bte Rustam' containing specimen pubic hairs;

C Envelope E:

- (i) one plastic packet labelled 'Farrah Deebea bte Rustam' containing two sets of glass slides, both of which he found to bear spermatozoa; and
(ii) two plastic tubes both labelled 'Farrah Deebea bte Rustam' and sealed 'Hospital Daerah Tapah Sulit (P)' each containing a vaginal swab. Preliminary analysis on the swabs indicated the possible presence of seminal stains. He enclosed the two plastic tubes containing the swabs in an envelope marked as 'E(A)' for DNA analysis.

Envelope F: one plastic packet containing one paper packet labelled 'Farrah Deebea bte Rustam' having specimen head hairs.

E [45] The chemist (PW13) has further stated in his chemist report (exh P18) that on 1 March 2001 at 8.10am, he received from chemist En. Khairul Anuar bin Abdul Aziz one envelope labelled 'IP FOR 364/01-1, marked 'A' and sealed 'Hospital Daerah Tapah Sulit'. He also found envelope 'A' to contain one tube labelled 'Sayed Mohd Faysal' having one specimen blood. A specimen bloodstains was prepared from this blood specimen for DNA analysis.

F He placed the specimen bloodstains in an envelope marked as 'A(2)'. He then handed back the envelope 'A(1)', 'E(A)', H, L, M, O, W, X, Y, 'A(2)' and package 'Z' sealed 'JABATAN KIMIA IPOH 2' to Sgt 86327 on 19 June 2001 for submission to the Department of Chemistry, Petaling Jaya, Selangor for DNA analysis.

G [46] Whereas Mr Lim Kong Boon (PW14) in his chemist report dated 21 September 2001 has stated that on 23 June 2001 Sgt 86327 Asohkumaran s/o Somasakran handed to him 10 envelopes and 1 packet and marked 'A(1), A(2), E(A), H, L, M, O, W, X, Y and Z respectively and all were sealed 'JABATAN KIMIA IPOH 2'. PW14 has also testified that after receiving the exhibits, all the exhibits were kept in their minus 20° centigrade chest freezer except the package which was kept in the cold room at 0° centigrade. He testified further that both the chest freezer and the cold room were under lock and key.

H [47] Mr Lim Kong Boon (PW14) has testified that he examined the envelopes and packages submitted and carried out DNA analysis on all the items. Based on his chemist report P19, he found as follows:

I A(1): A plastic packet containing a FTA card (labelled 'Farrah Deebea bte Rustam') stained with a blood specimen.

A(2): A plastic packet containing a FTA card (labelled 'Sayed Mohd Faysal' stained with a blood specimen.

A

E(A): Two plastics tubes (labelled 'Farrah Deebea bte Rustam') each containing a cotton swab.

[48] Mr Lim Kong Boon (PW14) has further stated upon completion of the examination of the exhibits, he returned them with the report exh P19 to Sgt 86327 Asohkumaran s/o Somasakran on 24 October 2001 at 11.10am.

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[49] The investigation officer (PW12) has testified in his examination-in-chief that 'Setelah post mortem dijalankan oleh Dr Mohd Shah, saya telah menerima beberapa barang kes yang saya percaya boleh membantu siasatan kes, di antaranya:

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- (1) kuku si mati;
- (2) darah si mati;
- (3) contoh air mani si mati;
- (4) coli;
- (5) bulu kemaluan si mati; dan
- (6) beberapa helai rambut si mati.'

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[50] PW12 has also testified that 'selain daripada barang-barang kes tersebut yang saya terima daripada Pathologist saya juga menerima barang-barang kes dari Cif Insp Rahman Din yang telah membuat tangkapan terhadap suspek dalam kes ini' and also other 'barang-barang kes daripada Cif Insp Hasnul Affandi bin Mohd Saleh'. It is important to state at this stage that there is no evidence from the Consultant Forensic Pathologist Dr Mohd Shah Bin Mahmood (PW15) either in his undated postmortem report exh P20 or in his oral evidence in court that first, he had handed those items referred to by PW12 to PW12 and secondly, whether he had taken the sample of blood and the fingernail clippings from the deceased and when.

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[51] The starting point in the process of DNA profiling must, of course be the direct obtaining of relevant bodily samples from the victim and the suspect. There must be direct evidence to show that the sample of blood was indeed obtained from the body of the deceased and the suspect, in the instant case, from the deceased and the accused to enable a comparison to be made with the stain of blood or semen extracted from the scene of the crime, from the motor car exh P10 and the clothings of the suspect and the deceased and provided that the clothings were worn by the deceased and the accused at the material time. However, in the instant case, the prosecution had failed to adduce such material evidence and instead had depended wholly and solely on the labels on the envelopes and packages which has the name of the deceased and the accused. In other words, there is absolutely no evidence from whose body, by whom and when was the sample of blood obtained and which was used for comparison by Mr Lim (PW14). Further, there is also no evidence as to: (a) where the sample of blood which was taken from a particular person's body was placed, stored and preserved; or (b) whether it was immediately

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- A** transmitted into a tube for safekeeping; and (c) who had labelled the tube, if the sample of blood was in fact kept in a tube; and (d) where it was kept until it was handed to PW13 on 22 February 2001 by PW12. In fact, there is absolutely no evidence whether the accused was ever taken to a hospital at all for the sample of blood to be taken from him.
- B** [52] In the instant case, this court has found the following infirmities in the prosecution case as to whose sample of blood was handed to PW14 for DNA analysis:
- C** (1) there is no evidence as to who had placed the label on the bottle 'Farrah Deebea bte Rustam' and sealed Hospital Daerah, Tapah in envelope A which PW 14 found in envelope A;
- D** (2) there is no evidence as to who had placed the label on the bottle labelled 'Farrah Deebea bte Rustam' and sealed Hospital Daerah Tapah which PW14 found in envelope B;
- (3) there is no evidence as to who had placed the label on the plastic packet containing one paper packet labelled 'Farrah Deebea Bt Rustam' having five pieces of right fingernail clippings which PW 14 found in envelope C;
- (4) there is no evidence as to who had placed the label on the plastic packet containing one paper packet labelled 'Farrah Deebea bte Rustam' having five pieces of left fingernail clippings which PW14 found in envelope C;
- E** (5) there is no evidence as to who had placed the label on the plastic packet containing specimen pubic hairs labelled 'Farrah Deebea bte Rustam' which PW14 found in envelope D;
- F** (6) there is no evidence as to who had placed the label on the plastic packet labelled 'Farrah Deebea bte Rustam' containing two sets of glass slides both of which was found to bear spermatozoa and;
- (7) there is no evidence as to who had placed the label in two plastic tubes both labelled 'Farrah Deebea bte Rustam' and sealed Hospital Daerah Tapah; each containing a vaginal swab which PW14 found in envelope E;
- G** (8) there is no evidence as to who had placed the label on the plastic packet containing one paper packet labelled 'Farrah Deebea bte Rustam' having specimen head hairs.
- H** [53] In his chemist report, exh P18, the chemist (PW13) has stated that he received the envelope marked 'A' from chemist En Khairul Anuar bin Abdul Aziz and in the envelope he found one tube labelled 'Sayed Mohd Faysal' having one specimen blood and then PW13 placed the specimen bloodstain in an envelope marked as 'A(2)' but the chemist (PW14) has stated in his chemist report exh P 19 that in the packet 'A(2)' he found a plastic packet containing FTA card labelled 'Sayed Mohd Faysal' stained with a blood specimen. The chemist (PW13) did not state in his chemist report exh P18 that the specimen bloodstain labelled 'Sayed Mohd Faysal' was put in a plastic packet containing a FTA card and then it was put in the envelope marked as A(2). There is no evidence as to what happened to the tube labelled 'Sayed
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Mohd Faysal' having one specimen blood which was found in envelope marked 'A' and received from the chemist En Khairul Anuar bin Abdul Aziz. It is not clear whether PW13 took a specimen bloodstain from the specimen blood found in the tube and placed it in the envelope or he took the entire specimen blood contained in the tube in the envelope marked as A(2) and then put the entire specimen blood in the envelope (see *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 at pp 270–273) (see *Public Prosecutor v Yiau Swee Tung* [1999] 3 MLJ 353 at p 356).

[54] This court found the entire evidence which leads to the DNA profiling of the sample of blood purported to be from the accused and the entire handling of the sample of blood to be so unsatisfactory and leaves so many material gaps. The accused therefore cannot be penalised for the lack of ingenuity and seriousness in the police investigation and the conduct of the prosecution and he is entitled to the time-honoured benefit of doubt (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 at p 142). If the prosecution wish to rely on DNA evidence to establish a link between the sample of blood and the suspect in the instant case, against the accused, the prosecution ought to have at least introduced the basic set of facts to show, who took the sample of blood, from whom, how and when and until such evidence is produced by the prosecution which the prosecution had failed to establish, the prosecution must accept the blame for this deficiency and the lack of seriousness shown in their conduct which has left so many vital gaps and remains unanswered which are material to the prosecution case. In view of the aforesaid material and glaring gaps and break in the chain of evidence, as whose sample of blood was sent to the chemist PW13, the evidence of PW14 on the DNA profiling and the comparison made on the sample of blood with the view to implicate the accused has to be rejected outright.

[55] In *Phoon Liat Sum v Public Prosecutor* [1950] MLJ 205, his Lordship Hill J in allowing the appeal of the accused against his conviction and sentence said:

... some of the evidence on which they were based was capable of a construction equally in favour of the accused.

I feel, therefore, though I confess with some hesitation, that there was a doubt in this case, the benefit of which it would have been safer to give to the appellant.

[56] In *Leow Nghee Lim v Reg* [1956] MLJ 28 at p 29, his Lordship Taylor J said:

... An accused is entitled to the benefit of anything which can be elicited from the prosecution evidence; the onus is on the prosecution to adduce convincing evidence of the facts necessary to raise a presumption before the onus on any issue is shifted ...

[57] In *PP v Kau Joo Huat* [1988] 2 MLJ 91 at p 93, his Lordship Lee Hun Hoe CJ (Borneo) said:

It is a matter of grave doubt whether on the totality of the evidence the prosecution has established that ... The benefit of the doubt should have been decided in favour of the accused ...

- A** [58] On the other hand, if this court had erred in its finding that there is no direct evidence that the sample of blood which was sent to PW13 and then subsequently to PW14 for the purpose of comparison was from the deceased and the accused and if the DNA profiling technique leads to match probabilities, there is still no evidence if there is a data base in existence and what is the size of the data base and how was the evaluation carried out. In his examination-in-chief, PW14 has testified that:
- B**
- (i) the blood stains specimen in envelope marked A(2) labelled 'Sayed Mohd Faysal' has 'probability of a randomly selected unrelated individual having a matching DNA profile is approximately 1 in 2.9 billion as calculated based on the Malaysian Malay population data base'; and
- C**
- (ii) as for the blood stains specimen in envelope marked A(1) and labelled 'Farrah Deebe bte Rustam', PW14 has testified that the probability of a randomly selected unrelated individual having a matching DNA profile is approximately 1 in 39 trillion as calculated based on the Malaysia Malay population data base.
- D**
- [59] Both this matching DNA profile which is based on the Malaysia Malay population data base does not show the data base kept by the forensic science laboratory in relation to the test which was carried out by PW14. He did not explain what he meant by 'the probability of a randomly selected unrelated individual having a matching DNA profile is approximately 1 in 2.9 billion as calculated based on the Malaysian Malay population data base and the approximately 1 in 39 trillion as calculated based on the Malaysian Malay population data base' in respect of the accused and the deceased respectively. This court finds that the 'probability of randomly selected unrelated individual having a matching DNA profiles' has not been clearly explained and the reference of approximately 1 in 2.9 billion appears to be an abstraction of a 2.9 billion population that does not exist in Malaysia or even the Malay population in Malaysia. A billion is one thousand million and the random occurrence ratio or the match probability figure as stated by PW14 in the context of the Malaysian population or the Malaysian Malay population is much to be desired and remains unexplained. In determining the admissibility of DNA evidence, the court must be able to confirm the statistical population table used in the calculation of the statistics used in accused's case for each specific probability which is generally accepted by relevant scientific experts. The same finding of this court is also applied to the sample of blood purported to be that of the deceased. Bearing in mind the complexity and the technical details of the evidence of a DNA profiling it is desirable that PW14 should have at least stated the size of the data base that is in existence in the laboratory and his reasoning in simple and lay language as to how he had arrived at the statistical evaluation. PW14 did not explain the detailed grounds of the processes and statistical assumptions in lay language lying behind the figure derived as to the statistical probability of implicating the accused (see *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 304 and *Regina v GK* [2001] NSWCCA 413).
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[60] DNA evidence becomes very significant if (i) there is evidence that the accused was near the scene of the crime when it was committed or (ii) has been positively identified as the suspect and (iii) there is other relevant and admissible circumstantial evidence. Matching data or the statistical conclusion based upon the random occurrence ratio deduced from the DNA evidence may be of significance and if not doubtful and is highly probative when there is sufficient additional or circumstantial evidence to connect the suspect with the crime. However, in the instant case, the DNA analysis has left so many unanswered gaps on the sample of blood to such an extent that it does not assist the prosecution to connect the accused to the crime of murder.

[61] PW14 did not testify for how long could a sample of blood be ordinarily preserved and if it is stored in a refrigerator for how long it could be preserved and what the kind of anti-coagulant was used so that the preserved blood is as efficacious as fresh blood. If the DNA is too old or poorly preserved its reliability and acceptance is questionable as the chances of bacterial contamination cannot be excluded. Sample that are old or poorly preserved may be more difficult to distinguish than fresh sample because degrading of the DNA reduces the sharpness of the bands, making them broad and blurring, variability in the position of the bands due to contemplating chemical or sloppy laboratory procedure may also decrease the resolution of the test. In some cases, if the DNA is poorly preserved, it may be exposed to adverse environmental condition and result in aging and drying and consequently cannot be reliable type. If PW 14 had found it necessary to keep the specimen blood in a minus 20° centigrade freezer and in a cold room at 0° centigrade, surely it was necessary for the prosecution to have adduced evidence where was the specimen or the sample of blood kept, stored or preserved from 22February 2001 until 19 June 2001 and then from 19 June 2001 until 23June 2001 where it was handed to PW14 for DNA analysis (see *William C Thompson and Simon Ford, DNA Typing New Genetic Identification Tests*) (75 VAL REV 45, 65 1989). It is important to consider that only a properly preserved stain would be of great evidential value in court and all this was not explained by PW14.

[62] In the instant case, there is also a serious break in the chain of the evidence as to the movement and preservation of the sample of blood. According to the chemist (PW13), he has stated in his report dated 16 March 2001 exh P18 that he was handed: (i) 11 sealed envelopes 'POLIS DIRAJA MALAYSIA — 104' marked 'A, B, G-O', (ii) sealed Hospital Daerah Tapah Sulit (P) envelopes marked 'C-F', (iii) a motor car "Proton Saga 12 V" and number plate 'ACE 8671' metallic grayish blue in colour on 22 February 2001 at 12.38pm by the Investigating Officer (PW12). He then examined amongst others the envelopes submitted and marked envelope 'A', envelope 'C'. (See chemist report dated 16 March 2001 exh P18). He prepared specimen bloodstain from the blood specimen found in one bottle labelled 'Farrah Deeba bte Rustam' and sealed Hospital Daerah Tapah Sulit (P) for DNA analysis and placed the specimen bloodstain in an envelope marked as 'A(1)'. PW13 has also stated that on 1 March 2001 at 8.10am, he received from chemist, En Khairul Anuar Bin Abdul Aziz one envelope labelled (IP)

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- A** for 364/01-1 marked 'A' and sealed Hospital Daerah Tapah Sulit. He found envelope 'A' to contain one tube labelled 'Sayed Mohd Faysal' having one specimen blood. He prepared a specimen bloodstain from the blood specimen for DNA analysis and placed the specimen bloodstain in an envelope marked 'A(2)'. He handed back the exhibits including the envelopes marked 'A(1)' and 'A(2)' to Sjn 86327 on 19 June 2001 at 10.55am together with his chemist report for submission to the Department of Chemistry, Petaling Jaya, Selangor for DNA analysis.
- B** There is no evidence where were both the blood specimens kept, stored or preserved from 22 February 2001 until it was handed to Sjn86327 on 19 June 2001 after a period of 118 days being the blood sample labelled 'Farrah Deebea bte Rustam' and as for the blood sample labelled
- C** 'Sayed Mohd Faysal' from 1 March 2001 to 19 June 2001 for a period of 111 days until it was handed to Sjn 86327 Asohkumaran s/o Somasakran. According to chemist PW 14, Sjn 86327 Asohkumaran s/o Somasakran handed to him 10 envelopes and one packet marked 'A(1)' and 'A(2)' on 23 June 2001, ie three days later. There is no evidence where was the blood specimen in packet marked 'A(1)' and 'A(2)' kept, stored or preserved on
- D** 19 June 2001 until it was handed by Sjn 86327 to PW14 on 23 June 2001. It is clear from the totality of the evidence of PW12, PW13 and PW14 that when PW14 received the sample of blood for DNA analysis, it was 122 days later for the blood sample labelled 'Farrah Deebea bte Rustam' when calculated from the date PW 13 received on 22 February 2001 and 115 days later for the blood sample labelled 'Sayed Mohd Faysal' from the time PW13 received
- E** on 1 March 2001 from chemist En Khairul Anuar Bin Abdul Aziz. In this context, it is important to note that PW12 did not state when he had received from Sjn 86327 Asohkumaran the envelopes marked 'A, B, G-O' which he had sent to PW13 on 22 February 2001 and before it was sent to PW14 for DNA analysis on 23 June 2001 by Sjn 86327 Asohkumaran. There is no
- F** evidence who took the blood specimen found in one bottle labelled 'Farrah Deebea bte Rustam' and as found in envelope 'A' which was handed to PW13 on 22 February 2001 and later marked by him as 'A(1)'. There is also no evidence who took and when the blood specimen contained in one tube and labelled 'Sayed Mohd Faysal' and as found in envelope 'A' which was handed to PW 13 on 1 March 2001 at 8.10am by chemist En. Khairul Anuar bin Abdul Aziz and later marked by PW13 as 'A(2)' and handed to Sjn 86327
- G** on 19 June 2001 for DNA analysis.

- H** [63] There is no evidence of data base kept by the Forensic Science Laboratory in relation to the test which was carried out by PW14. Data bases have to be built up and cannot just exist overnight so as to demonstrate the probability that another person would share the particular blood type or would match the DNA of the suspect at the particular genetic maker. The data base from which such extrapolation is made must be representative of the general community from which the sample constitute such data base is drawn otherwise it may appear to be a hypothetical population that does not exist unless there is evidence as to what is the existing data base (see *R v Noll* [1999] 3 VR 704, *R v Milat* [1996] 87A Crim R 446, *R v Deen The Times* 10 January 1994, *R v Kotzmann* [1999] 2 VR 723, *Shepherd v R* [1990] 170 CLR 573, *R v Pantoja* [1996] 88 A Crim R 544).
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[64] In the instant case and in any event, this court is of the view that the matching DNA characteristics between the DNA in the crime stain and the DNA found in the sample of blood may assist the prosecution to link the accused if there was proof that the sample was in fact taken from the accused and only then the random occurrence ratio will become relevant. It is for this reason that the prosecution should have led evidence as to when and from whom the sample of blood were taken for DNA analysis.

[65] Be that as it may, even assuming that the evidence of PW14 is acceptable to implicate the accused it is only an incriminating piece of evidence as it still remains that the results of his analysis of the bloodstains and the samples of blood is not final and conclusive and it is still for the court as the trier of fact to draw an inference and the weight and value to be given to such evidence. In *R v Doheny and R v Adams* 1997 1 Cr App Rep 369, Phillips LJ (reading the judgment of the court) observed:

Even if a number of bands correspond exactly, any discrepancy between the profiles, unless satisfactorily explained will show a mismatch and will exclude the suspect from complicity. Thus the first stage is seeking to prove the identity by DNA profiling is to achieve a match.

The cogency of DNA evidence makes in particularly important that DNA testing is rigorously conducted so as to obviate the risk of error in the laboratory, that the method of DNA analysis and the basis of subsequent statistical calculation should — so far as possible — be transparent to the Defence and that the true import of the resultant conclusion is accurately and fairly explained to the Jury.

When the scientist gives evidence it is important that he should not overstep the line which separate his province from that of the Jury.

He will properly explain to the Jury the nature of the match (the matching DNA characteristics) between the DNA in the crime stain and the DNA in the blood sample taken from the defendant. He will properly, on the basis of empirical statistical data, given the Jury the random occurrence ratio — the frequency with which the matching DNA characteristics are likely to be found in the population at large. *Provided that he has the necessary data*, and the statistical expertise, it may be appropriate for him then to say how many people with the matching characteristics are likely to be found in the United Kingdoms — or perhaps in a more limited relevant sub group, such as, for instance, the Caucasian sexually active males in the Manchester area. This will often be the limit of the evidence which he can properly and usefully give. It will then be for the Jury to decide, having regard to all the relevant evidence, whether they are sure that it was the defendant who left the crime stain, or whether it is possible that it was left by someone else with the same matching DNA characteristics. (Emphasis added.)

[66] This court found that the material gap and break in the chain of evidence as to whose sample of blood was in the envelopes is so serious that the evidence as to the identity of the suspect is further weakened and in great doubt as to the nexus between the bloodstains and the sample of blood used for comparison by PW14. Consequently, it absolves completely the accused to the extent of even to merely implicating him to the crime of murder and taking into consideration that the circumstantial evidence which the prosecution had relied on is itself contains infirmities and improbabilities.

- A** [67] In the instant case, since the circumstantial evidence is not accepted by the court to link the accused to the crime of murder, the DNA evidence if viewed in isolation cannot assist the prosecution to implicate the accused unless the DNA evidence is supported by other circumstantial evidence and failing which the DNA evidence ceases to be of any assistance to the prosecution to implicate the accused to the crime of murder. As found by this court, PW 14 not only did not explain how he had carried out the DNA analysis test but he also did not testify how he had determined or arrived at the statistical calculation to link the sample of blood to the deceased and the accused. In *Teoh Ng Choon & Ors v Public Prosecutor* [1955] MLJ 58, Hill J observed:
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- C** Counsel in both the appeals under review criticized the expert's evidence as falling very short of the usual requirements with regard to detailed explanations of the exhibits. *I agree that fuller explanations and reasons for the opinions expressed could and should have been given in each case.* (Emphasis added.)
- D** [68] In *Ong Yap Chang v Public Prosecutor* [1962] MLJ 46, Adams J said:
... as the expert had given no reasons for his conclusions, the learned Magistrate was in no position to judge whether the evidence of the expert was in fact acceptable. There was therefore no evidence on which he came to his finding that the exhibits were in fact ...
- E** [69] As the circumstantial evidence which the prosecution was relying on was not safe to act upon it as has been found by this court where it does not point irresistibly to the guilt of the accused then the evidence of both the chemist which included the DNA evidence ceases to be of any assistance to the prosecution to establish the charge against the accused especially so where there is no evidence as to who took the sample of blood, from whom, how and when. The evidence as to who took the sample of blood, from whom, when and how and when it was taken is indispensable. The fact that the investigating officer (PW12) has labelled the envelopes with the name of the deceased and the accused and then handed over to the chemist for analysis is not evidence in law to say that the sample of blood belong to the deceased and the accused. Both PW13 and PW14 have no personal knowledge that the sample of blood which was handed to them was taken from the deceased or the accused. The evidence of PW 13 and PW14 that the sample of blood belongs to the deceased and the accused which was based on the label to the packet, bottle and tube would be of no legal significance and of assistance to the prosecution unless there is evidence that the sample of blood were in fact taken from the body of the deceased and the accused and there must be direct evidence to this effect. In the circumstances, this court found that there was no admissible evidence before this court that the sample of blood analysed and examined by both the chemist belonged to the accused and the deceased. This court has to repeatedly emphasis the weaknesses and gaps on the issue of the blood sample as it is crucial for the prosecution to have closed the gaps if they were so seriously relying on the DNA analysis to connect the accused to the crime of murder.
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Post Mortem

[70] There is also no medical evidence as to the probable time of the death of the deceased. The forensic pathologist PW15 who conducted the post mortem of the deceased was not even asked by the learned deputy public prosecutor as to the likelihood or probability of the time the death of the deceased had occurred. In the absence of any evidence as to the probable time of the death of the deceased, this court is not only unable to connect the accused with the crime of murder but is unable to make any finding that the deceased was murdered between 2.30pm on 13 February 2001 and 7.30pm on 14 February 2001 as framed by the charge. This is a clear case of the prosecution attempting to proceed on the basis of speculation as to the date and time of death of the deceased where the prosecution had every opportunity to show some nexus as to the probable time the deceased could have been murdered by seeking the opinion of the forensic pathologist PW15 but it has once again failed in its duty to obtain this material piece of evidence to support the charge.

[71] Based on the totality of the evidence adduced on behalf of the prosecution, this court found that the conditions which are necessary to be satisfied for circumstantial evidence to be accepted have not been established. The whole of the prosecution case seem to generate suspicion that it may be the accused who is implicated to the crime of murder of the deceased but it has been said time and time again and it requires no reminder that suspicion however grave cannot be a substitute for evidence or to satisfy the test on circumstantial evidence. It is axiomatic that this court cannot entertain or act on theories based on speculation or conjecture unless there are sufficient admissible materials or evidence to draw reasonable inference. In *Caswell v Powell Dufflynn* [1940] AC 152 at pp 169–170, Lord Wright observed:

Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[72] Circumstantial evidence is usually relied on where there is no independent witness or witnesses who would come forward to relate the incident or the truth. It is the type of evidence of the surrounding circumstances which by undersigned or coincidence is capable of proving a proposition with the accuracy of mathematics and must be capable of leading to only one conclusion, that is irresistibly to the guilt of the accused. In the instant case, PW12 has admitted under cross-examination that there is no eye-witness to the crime of murder.

[73] In *Kartar Singh & Anor v Rex* [1952] MLJ 85 at p 86, Murray-Aynsley J said:

... Where there is direct evidence, however, slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence

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- A the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all.

[74] In *Abdullah bin Saad v PP* [1956] MLJ 92, the appellant was convicted of murder and sentenced to death. On appeal the conviction and sentence was quashed and the appellant was directed to be freed on the ground that mere possession of the jewellery of the deceased was insufficient to found a conviction of murder. The only evidence to connect the appellant with the murder of the deceased was the possession of two pieces of jewellery which belonged to the deceased but there was no certainty that the jewellery were found on the deceased's person on the day of his death.

[75] In *Idris v PP* [1960] MLJ 296, the appellant was convicted and sentenced for the murder of his ex-wife. The prosecution case consisted mainly of circumstantial evidence and the grounds raised on behalf of the appellant at the Court of Appeal was that the jury was not properly directed on the circumstantial evidence.

[76] In dismissing the appeal against conviction and sentence, Hill CJ said that the learned trial judge had dealt comprehensively on all the evidence in his summing up. At the end of the prosecution case, the learned trial judge had this to say:

E With regard to the definition of circumstantial evidence I can give you no better definition than quote to you the words of Lord Cairns in the case *Belhaven & Stenton Peerage* reported in 1875–6 Appeal Cases, p 279:

F ‘My Lords, in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.’

G In other words circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undesigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.

H [77] In *Jubri v Public Prosecutor* [1962] MLJ 34, the appellant was convicted of murder and sentenced to death. He appealed against his conviction and sentence. The prosecution had relied on circumstantial evidence. The summing up to the jury by the trial Judge was, inter alia, that the evidence against the appellant was purely circumstantial and that before they could convict on circumstantial evidence, such evidence ‘must rule out any other reasonable possibility before you can accept it as sufficient evidence upon which you may find him guilty.’

[78] In allowing the appeal and relying on the principal enunciated by Murray-Aynsley CJ, *Kartar Singh & Anor v Rex*, Thomson CJ said:

We gave the evidence in the case our most careful and anxious consideration and in the event we were forced to the conclusion that having regard to the evidence the verdict of the jury could not be supported. If it were true the prosecution evidence certainly afforded grounds for very grave suspicion ...

[79] Thomson CJ also referred to what was said by Lord Hewart CJ in *Wallace* 23 Cr AR 32, at p 35:

the case against the appellant ... was not proved with that certainty which is necessary in order to justify a verdict of guilty.

[80] In *Chan Chwen Kong v PP* [1962] MLJ 307, the appellant was convicted of double murder and sentenced to death. He appealed against his conviction. Here again the summing up to the jury by the learned trial judge was criticised on the issue of corroboration and the onus on the accused. However, in dismissing the appeal against conviction, Thomson CJ observed:

In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

The real question in the case was not whether the witnesses were to be believed but whether the various circumstances to which they spoke pointed irresistibly in one direction and one direction only, that direction being the guilt of the prisoner ...

[81] In *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25, the appellant was convicted of murder and sentenced to death. His conviction was based solely on circumstantial evidence. He appealed to the Federal Court against his conviction and sentence. In allowing the appeal and quashing the conviction, HT Ong FJ (as he then was) said:

... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ...

[82] In *Ng Hoong Kee v Public Prosecutor* [1967] 1 MLJ 85, the appellant was convicted on a charge of causing mischief by intending to cause the destruction by fire of a house. The appellant appealed against his conviction. At the hearing of the appeal, the learned deputy public prosecutor conceded that the evidence against the appellant was only circumstantial evidence. Azmi CJ (Malaya) in delivering the oral judgment said that in cases where evidence is circumstantial it is:

... for the trial court to consider whether these bits of evidence are true and having regard to all of them whether they force him to come to one conclusion and one conclusion only that the appellant was guilty.

- A** [83] In allowing the appeal and setting aside the conviction and sentence, Azmi CJ (Malaya) said that:

... there was insufficient evidence upon which the learned judge could have come to the conclusion beyond reasonable doubt that it was the appellant who started the fire to destroy the building ...

- B** [84] In *Public Prosecutor v Lai Pong Yuen & Ors* [1968] 1 MLJ 12, Ismail Khan J observed:

... Bearing in mind that the evidence is only circumstantial, it is difficult to see how such evidence could point irresistibly to the guilt of the respondent. The learned Legal Adviser must have seen the difficulty he was in at the trial when he sought to bring in evidence of system which was refused, in my view rightly

- C** [85] In *Muniandy & Anor v Public Prosecutor* [1973] 1 MLJ 179, the appellants were convicted on a charge of rape and sentenced to five years imprisonment and four years respectively. In allowing the appeal against conviction and sentence, HT Ong CJ said:

- D** Wherever circumstantial evidence is relied on by the prosecution in building up its case against an accused person, any such piece of evidence must tend only in one direction, that is to say, suggest or lend support to an inference of guilt. This evidence, if capable of an innocent interpretation — or ambiguous, as being equally consistent with guilt or innocence — should never be placed before the jury as circumstantial evidence strengthening the prosecution case. Any summing-up which fails to explain this intelligibly to the jury is a serious misdirection. All the more so, where, in the instant case, circumstantial evidence more consistent with innocence than guilt was represented to the jury as corroboration of the complainant's evidence. On the other hand, where the circumstantial evidence is seen to be strongly in favour of the defence, a proper trial requires that, in the interests of justice, this fact be brought to the notice of the jury and not passed over as an irrelevant detail.
- E** Had the jury in this case been directed that, from the father's failure to see the clothing where he could not have failed to notice it, they should draw their own conclusions as to whether complainant was telling the truth, there can be little doubt what the verdict would have been.
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- [86] In *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168, at p 169, Gill CJ said:

- G** ... But in a case such as this, where the charge is murder and the evidence entirely circumstantial, the links in the chain of evidence must be strictly established ...

- H** [87] In *Kamis v PP* [1975] 1 MLJ 46, the appellant was convicted on a charge of murder and sentenced to death. His appeal against conviction to the Federal Court was dismissed. In this case, the evidence against the appellant was entirely circumstantial. However, the circumstantial evidence against the appellant were:

- I** (1) A game ranger had seen the appellant sitting in front of a kongsi house not far from the scene of the crime on the afternoon in question. (2) Later, the same game ranger saw the appellant in the rubber land near the scene of the crime. (3) The appellant was then pushing a bicycle carrying a bag, later identified as the deceased's school bag, on the handle bar of the bicycle. (4) After his arrest the appellant led the police to a place from where the bag was recovered. (5) He also took the police to a place from where a pair of green rubber shoes belonging to him were recovered. (6) There was a green shoe lace in the left shoe but there was no shoe lace in the

right shoe. As we have said, a green shoe lace was found at the place where the deceased's body was found. (7) The chemist's report stated that the shoe lace found near the dead body and the one which was found in the left shoe matched perfectly. (8) The appellant admitted that the shoe belonged to him.

[88] Based on the various circumstantial evidence and considering the summing up, Gill Ag LP said it was impossible for us to say that there was a miscarriage of justice. In the summing up to the jury, the learned trial judge had reminded them that *'for a court to rely on circumstantial evidence the evidence when considered must point only to the guilt of the accused; it must not be capable of any other interpretation or any other meaning.'*

[89] In *Lim Foo Yong v Public Prosecutor* [1976] 2 MLJ 259, the appellant was convicted by the sessions court on an amended charge of failing to declare his interest in a contract entered into by a company of which he was the managing director an offence under s 131(1) of the Companies Act 1965. In allowing the appeal where the conviction was quashed, Chang Min Tat J (as he then was) said (at p 262):

It is therefore obvious and beyond argument that the learned President Sessions Court had, with respect, not considered the whole evidence from all angles, as she ought to have done: see the judgment of the Federal Court in *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25 where it was held that:

'In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused. Where the judge had omitted to view the relevant fact from all angles and the case was not put to the jury in a way to ensure due appreciation of the value of the evidence, there had been a miscarriage of justice.'

Failure to direct her own mind as a trial judge of fact, sitting alone, is of course the same as failure to direct the jury correctly. It is impossible to say whether had she not failed to do so, she would nevertheless have been "compelled to the one conclusion" of the defendant's guilt: see *Idris v Public Prosecutor* [1960] MLJ 296 or held that 'the circumstantial evidence must point irresistibly to the guilt of the accused,' per Ismail Khan J. (as he then was) in *Public Prosecutor v Lai Peng Yuen & Ors* [1968] 1 MLJ 11.

[90] In *Dato' Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232, Abdoolcader FCJ said (at p 275):

Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the court to expressly state this is not a fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt (*Jayaraman & Ors v PP*).

[91] In *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306, the appellants were convicted by the Sessions Court, Klang on four charges under s 304 read with s 34 of the Penal Code for causing the death of four persons. On appeal, Syed Othman FJ said:

I am well aware that the 'irresistible' formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *McGreevy v Director of Public Prosecutor* where it was argued, at p 279, before the House of Lords

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- A** that in a criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts
- B** proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.

[92] On further appeal to the Federal Court, (see [1982] 2 MLJ 306 at p 310), Suffian LP said:

- C** In our view the irresistible conclusion test only *seems* to place on the prosecution a higher burden of proof than in a case where it depends on direct evidence, for in fact to apply the one and one only irresistible conclusion test is another way of saying that the prosecution must prove the guilt of the accused beyond reasonable doubt.
- D** As Syed Othman FJ said in the instant case this is only a 'play on words'. If the facts proved point to a reasonable alternative to the guilt of the accused, that is only another way of saying that there is a doubt in the prosecution case and so the prosecution has not proved its case beyond reasonable doubt. Similarly if the facts proved show some reasonably possible explanation, for example an accident, or if they are inconsistent with any other hypothesis than that of the guilt of the accused or if they are capable of an innocent interpretation or if they are ambiguous as being equally consistent with guilt or innocence. In all these cases the facts proved do not point to the guilt of the accused, the trial court is or cannot be sure that the accused is guilty and must acquit — because the prosecution has not proved its case beyond reasonable doubt.
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- [93]** (see also *Juraimi Husin v PP*; *Mohd Affandi bin Abdul Rahman & Anor v PP* [1998] 1 MLJ 537)
- F**

- [94]** In *Chandmal & Anor v State of Rajasthan* AIR 1976 SC 917, the appellant Chandmal was convicted for murder under s 302 of the Penal Code and sentenced to imprisonment for life. He was further convicted of an offence of ss 411 and 201 of the Penal Code. The other accused Ranglall was acquitted under charges of ss 302 and 201 of the Penal Code but convicted for an offence of s 411 of the Penal Code. On appeal to the High Court, their appeal against conviction was dismissed. On further appeal by special leave to the Supreme Court, the appeal was allowed and the conviction against both the appellants was set aside. Sarkaria J on delivering the judgment of the Supreme Court said:
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- H** It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt.
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[95] In (1) *Namasiyiam*, (2) *Rajindran* (3) *Goh Chin Peng*, and (4) *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 344, Syed Agil Barakbah SCJ, (delivering the judgment of the Supreme Court) said:

Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference.

[96] In *Gambhir v State of Maharashtra* AIR 1982 SC 1157, the appellant was convicted for an offence of murder of three persons under s 302 of the Penal Code and sentenced to death. On appeal, Misra J in delivering the judgment of the Supreme Court:

It has already been pointed out that there is no direct evidence of eye witness in this case and the case is based only on circumstantial evidence. *The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy three tests: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused, (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. In the light of the legal position about the circumstantial evidence, we have to examine whether the circumstantial evidence in the instant case satisfies the requirements of law.* The circumstantial evidence in the instant case may be broadly classified into three parts; (1) oral evidence to prove that in the absence of Namdeo, the accused used to visit the house of Laxmi regularly and he was seen in the evening of 26 of Feb, 1975 in the company of Laxmi and her children. He was also seen at about 10.00pm the same night in the company of Laxmi under a Neem tree in the village. At midnight he was again seen going along the way near the house of Babulal, (2) the various recoveries most of them at the instance of the accused and (3) medical evidence.

On scrutiny the only thing established is that the accused and other persons used to visit the house of Laxmi during the absence of her husband and that he was again seen in the company of Laxmi on 26 February in the night till before dinner time. This single circumstance by itself is too feeble to connect the accused with the murder of Laxmi and her children.

From the evidence discussed above, we find that the three conditions which are necessary to be satisfied before circumstantial evidence can be made the basis for conviction have not been fulfilled. *There may be suspicion against the accused but the suspicion cannot take the place of evidence.* The approach of the High Court in the appraisal of evidence is not at all satisfactory. *The evidence on the record falls short of proving the guilt of the accused beyond all reasonable doubt.*

(Emphasis added.)

In *Ram Avtar v The State (Delhi Administration)* AIR 1985 SC 1692, the appellant was convicted under s 302 of the Indian Penal Code and sentenced to imprisonment for life by the High Court. The case against the appellant was purely on circumstantial evidence. Fazal Ali J in delivering the judgment of the Supreme Court said:

- A** At the very outset we might mention that circumstantial evidence must be complete and conclusive before accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, e.g. where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words *where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated*. The learned Sessions judge seems to have fallen into this very error. In the instant case, instead of taking all the circumstances together, which are undoubtedly circumstantial and closely linked up with one another, the learned Sessions judge has completely misdirected himself by separately dealing with each circumstance thereby making a wrong approach while appreciating the circumstantial evidence produced in the case.
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... It is not possible for us to consider the various chains of circumstances, mentioned above, in isolation by divorcing them from the other circumstances which are closely interlinked with them ...

- D** Before concluding we might observe that where circumstantial evidence consists of a chain of continuous circumstances linked up with one another, the court has to take the cumulative effect of the entire evidence led by the prosecution before acquitting or convicting an accused.

(Emphasis added.)

- E** [97] However, in that case, the Supreme Court dismissed the appellant's appeal against conviction based on the set of facts and the circumstantial evidence as being sufficient to found a conviction.

- F** [98] In *Chandu v State of Madhya Pradesh* AIR 1992 SC 2302, the appellant was convicted at the High Court for an offence of murder. He was sentenced to imprisonment for life. The prosecution's case rested entirely on circumstantial evidence. The trial court relied on the following circumstantial evidence to find the appellant guilty of the charge of murder:

The trial court relied upon the following circumstances to hold the appellant guilty of the murder of Hemrai:

- G** (1) The accused was grazing his cattle in a Nalla of village Singhanbhedi when the deceased had passed this nalla in order to go to his field in the adjoining village Renutola.
- (2) There was sign of struggle on the spot across this Singhanbhedi nalla in the field of Bhahmmalal and thereafter almost the mark of continuous dragging towards the field of Uderam where the dead body of the deceased Hemraj was found. The upper part of the body of the deceased had no clothes and was bare.
- H** (3) The deceased had left his house wearing the clothes including the shirt (Art A-1) and neck thread (Art A-3).
- (4) The accused has recovered the shirt of the deceased (Art A-1) from the tank of Singhanbhedi and the shirt was duly identified proceedings.
- I** (5) The accused had injuries in his body and the cloth of the accused was found bloodstained.
- (6) The accused had beaten the deceased some 15 days prior to the occurrence and had threatened to kill him.

[99] In allowing the appeal and setting aside the conviction, the Supreme Court gave the benefit to the appellant. Kuldip Singh J who delivered the decision of the Supreme Court said:

The prosecution examined Pardeshanbai (PW2) sister of the deceased; Sukhwanrinbai (PW3) mother of the deceased and Kumar (PW5) brother of the deceased to prove the circumstance that the deceased and the appellant were last seen together. According to these witnesses they were returning from their fields in village Renutola to their village Singhanbhedi and when they reached near the Nalla they saw the appellant grazing cattle. These witnesses further deposed that they also saw the deceased who was about to cross the Nalla from the side of Singhanbhedi village. None of these witnesses actually saw the appellant and the deceased together. Simply because the appellant, the deceased and various other persons including the witnesses, were in the vicinity of Nalla at the relevant time it cannot be assumed that the deceased and the appellant were seen together. There is no evidence that the deceased and the appellant talked to each other or even met each other near the Nalla. We are of the view that the factum of appellant grazing his cattle near the Nalla and the deceased passing through that area is by itself, not sufficient to hold that they were last seen together. So far as the recovery of shirt worn by the deceased at the instance of appellant, we are of the view that this part of the story is highly improbable and difficult to believe. There is no reason whatsoever as to why the murderer of the deceased should take the shirt of the deceased along with him. One can imagine the taking away of jewellery, weapon or some other valuable article from the person of deceased but the taking away of the shirt of the deceased by the appellant is a circumstance which cannot be believed. This is obviously a police padding. Regarding the injuries on the person of the appellant, he has explained that the police gave him beatings after his arrest. *Having disbelieved the circumstantial evidence regarding their last seen together and the recovery of the shirt belonging to the deceased, it is difficult to sustain the conviction of the appellant.*

(Emphasis added.)

[100] In *Kansa Behera v State of Orissa* AIR 1987 SC 1507, the accused was convicted on a charge of murder under s 302 of the Indian Penal Code. On appeal, the conviction was quashed. In allowing the appeal, Oza J for the Supreme Court said:

As regards the recovery of a shirt and dhoti which are alleged to be stained with human blood, it was contended that there is no clear evidence to indicate that the appellant was wearing dhoti at the time of the incident. As regards shirt it was contended that although the serologist report indicates that it is stained with human blood but blood grouping is not there. In this view of the matter the presence of some stains of human blood after sometime could not be a circumstance on the basis of which any conclusive inference could be drawn. It was therefore contended that in view of these circumstances it could not be held that the circumstances point to the only conclusion of the guilt of the appellant.

As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist reports were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the clothes of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the

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- A blood-stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn.

- B So far as the appellant being with the deceased in the evening is concerned, it is not in dispute. But it is also significant that the instrument of the offence was recovered at the instant of one Jitrai Majhi who has been discharged and under these circumstances therefore the evidence about the appellant having been seen in the evening with the deceased also is of no consequence. *It is a settled rule of circumstantial evidence that each one of the circumstances have to be established beyond doubt and all the circumstances put together must lead to the only one inference and that is of the guilt of the accused.* As discussed above the only circumstance which could be said to have been established is of his being with the deceased in the evening and on that circumstance alone the inference of guilt could not be drawn especially in the circumstances of the case where one another accused person from whom an instrument of offence was recovered, who had a grudge against the deceased has been let off.

(Emphasis added.)

- D [101] In *Surinder Pal Jain v Delhi Administrator* AIR 1993 SC 1723, the accused was charged for the murder of his wife. He was acquitted by the sessions judge. On appeal, the High Court reversed the order of acquittal and convicted the appellant on a charge of murder and sentenced to life imprisonment. On further appeal by special leave to the Supreme Court, Dr Anand J in delivering the judgment of the Supreme Court said:

- E In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and those circumstances must be conclusive in nature. Moreover, the established facts should be consistent only with the hypothesis of the guilt of the accused alone and totally inconsistent with his innocence.

- F On an independent appraisal of the evidence on the record, we have therefore unhesitatingly come to the conclusion that the learned Sessions Judge was perfectly justified in acquitting the appellant of all the charges and the reasoning given and the findings recorded by her are sound, cogent and reasonable. The High Court was not justified to set aside those findings on surmises and conjectures. The finding of guilt recorded against the appellant by the High Court is not sustainable in law and we agree with the learned Sessions Judge that the prosecution has not established the case against the appellant beyond a reasonable doubt. We, accordingly, set aside the judgment of the High Court convicting the appellant for the offence under Sec 302/ 203, IPC. The appeal is allowed and the appellant acquitted of both the charges. The appellant is on bail, his bail bonds shall stand discharged.

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- H [102] In *Lavji Mona v State of Gujarat* Cri LJ 3148, the appellant was convicted on a charge of murder for causing the death of his wife by inflicting injuries with an axe. The prosecution case rested on circumstantial evidence, retracted extra judicial confession and recovery of blood stained shirt of the deceased. The trial court acquitted the appellant as there was insufficient evidence to sustain the charge. On appeal by the prosecution, the High Court held that the circumstances put forward on the sets of facts was sufficient to establish the guilt and accordingly convicted the appellant. On further appeal to the Supreme Court by the appellant, the Supreme Court confirmed the conviction and, inter alia, held that the High Court had rightly interfered where it convicted

the appellant. The Supreme Court also found that there are two views possibly against the appellant.

[103] In *State of Haryana v Ved Prakash* AIR 1994 SC 468 the accused was acquitted on a charge of murder by the trial court. The prosecution had relied on circumstantial evidence. In confirming the acquittal by the High Court, the Supreme Court held:

It is one of the stated principles of law that a witness may lie but not the circumstances. But this Court through a number of pronouncements has repeatedly cautioned that the Court must adopt cautious approach while basing its conviction purely on circumstantial evidence. Therefore, our endeavour has been to find out whether the circumstances in this case would establish the crime attributed to the accused. The three important circumstances as the High Court has pointed out are: (i) the deceased going towards the sugarcane field during which time also the accused was seen going in the same direction with the spade; (ii) the extra judicial confession made Dr Raj Kumar in the presence of Lal Chand; and (iii) the matching of the crime moulds found near the dead bodies. On a careful perusal of the judgment under appeal and on hearing the learned counsel for the appellant and the respondent, we are unable to persuade ourselves that the High Court has gone wrong. The fact the accused was going in the direction of the sugarcane field from where the bodies were recovered is hardly a circumstance which would ever establish the crime attributed to the accused, the prosecution has failed, in our opinion, to prove in conclusive manner the presence of the accused and the deceased in the same area before they met with death.

Lastly, what remains is matching of shoes recovered under exhs P6 and P7. This circumstance is far-fetched to establish the offence. In the result, we see no warrant for interference. The appeal is dismissed accordingly.

[104] In *Kali Ram v State of HP* AIR 1973 SC 2773, the accused was convicted on a charge of murder and sentenced to death by the sessions judge. On appeal to the High Court, the conviction and sentence were affirmed. The accused then appealed to the Supreme Court by special leave. In delivering the judgment of the Supreme Court, Khanna J said:

Observations in a recent decision of this court, *Shivaji Sahebrao v State of Maharashtra* Cri Appeal No 26 of 1970, D-27-8-1973 (reported in AIR 1973 SC 2622) to which reference has been made during arguments were not intended to make a departure from the rule of the presumption of innocence of the accused and his entitlement to the benefit of reasonable doubt in criminal cases. *One of the cardinal principles which has always to be kept in view in our system of administration of justice for criminal cases is that a person arraigned as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged. The burden of proving the guilt of the accused is upon the prosecution and unless it relieves itself of that burden, the courts cannot record a finding of the guilt of the accused ...*

Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence. Rule has accordingly been laid down that unless the evidence adduced in the case is consistent only with the hypothesis of the guilt of the

- A** accused and is inconsistent with that of his innocence, the court should refrain from recording a finding of guilt of the accused. It is also an accepted rule that in case the court entertains reasonable doubt regarding the guilt of the accused, the accused must have the benefit of that doubt. Of course, the doubt regarding the guilt of the accused should be reasonable: it is not the doubt of a mind which is either so vacillating that it is incapable of reaching a firm conclusion or so timid that it is hesitant and afraid to take things to their natural consequences. The rule regarding the benefit of doubt also does not warrant acquittal of the accused by resort to surmises, conjectures or fanciful considerations. As mentioned by us recently in the case of *State of Punjab v Jagir Singh* Cri Appeal No 7 of 1972 D-6-8-1973 (reported in AIR 1973 SC 2407) a criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the offence with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is *ex facie* trustworthy on grounds which are fanciful or in the nature of conjectures.
- B**
- C**
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- E** It needs all the same to be re-emphasised that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from the accused. The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused.
- F** The conflict in this respect, in our opinion, is more apparent than real. As observed on p 3 of the book entitled 'The Accused' by JA Coutts (1966 Ed), 'when once it is realised, however, that the public interest is limited to the conviction, not of the guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal.'
- G**

- H** It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person. Some risk of the conviction of the innocent,
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of course, is always there in any system of the administration of criminal justice. Such risk can be minimised but not ruled out altogether.

Certainly it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distinction between 'may be' and 'must be' is long and divides vague conjectures from sure considerations. (Emphasis added.)

[105] In *McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276, the Court of Criminal Appeal of Northern Ireland said:

Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that *before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion.*

(Emphasis added.)

[106] In *Chang Kim Siong v PP* [1968] 1 MLJ 36, the evidence against the appellant was circumstantial. The appellant was convicted of murder based on circumstantial evidence. He appealed to the Federal Court. In allowing the appeal against conviction, Pike CJ (Borneo) who delivered the judgment of the Federal Court said:

... The onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient ...

[107] In *Sunny Ang v Public Prosecutor* [1963] 2 MLJ 195, the appellant was convicted of murder even though the body of the deceased was not found and the prosecution relied on circumstantial evidence. However, there were various circumstantial evidence adduced by the prosecution in that case and is distinguishable when compared to the facts in the instant case where it was pointed out by learned counsel in the instant case before this court. In that case, the circumstantial evidence which were highlighted in the judgment was as follows:

- (1) The appellant had been made a bankrupt in October 1962 and was still a bankrupt on the 27 August 1963, being the day on which the offence was alleged to have been committed. He was in need of money and that could be a motive for the crime.
- (2) On the 27 August 1963, Jenny was insured against accidents with several insurance companies, the total sum being \$450,000.
- (3) One of the insurance policies under which Jenny was insured for the sum of \$150,000 had lapsed on the 26 August 1963 but was renewed by the appellant on the morning of the 27 August 1963 for another five days. The appellant, however, did not renew or extend his own insurance policy which had been taken out at the same time.
- (4) Another one of these insurance policies, which was for the sum of \$100,000, was due to expire on the 28 August 1963.

- A** (5) The beneficiary named in some of the policies was the appellant's mother. In the case of the other policies the benefit was to go to Jenny's estate.
- (6) Jenny, who was 22 years of age and was a bar waitress earning \$90 per month and about \$10 in tips per day when she worked, made a will on the 7 August 1963 in which the appellant's mother was named as the sole beneficiary. The appellant accompanied Jenny to the solicitor's office when instructions for the preparation of the will were given to the solicitor.
- B** (7) Jenny had only a little experience of what is called scuba diving and might fairly be described as a novice scuba diver. This was known to the appellant, although he claimed that she had made good progress under his tuition.
- (8) On the 27 August 1963, the appellant allowed Jenny to go down into the waters near Pulau Dua alone. According to an expert witness, it was not safe for a novice to scuba dive alone.
- C** (9) The waters near Pulau Dua were dangerous and hazardous. The appellant had dived in these waters on previous occasions and was in a position to know this.
- (8) The appellant did not go down into the water himself even after Jenny had failed to come to the surface.
- D** (10) Jenny did not wear gloves when she went down into the water. This could be inferred, if the jury decided to do so, from the fact that the two pairs of gloves which had been brought by the appellant on that occasion were still in his swimming bag. Gloves were usually worn when looking for corals in order to prevent the hands and fingers from being cut. It was of course for the jury to decide whether the gloves produced in court were the very same gloves which were in the appellant's swimming bag on the 27 August 1963. The jury were in a position to observe that the appellant was unable to explain why there should be two pairs of gloves in the swimming bag after Jenny had disappeared. It was open to the jury to reach the conclusion that the appellant did not really intend to look for corals that day.
- E**
- F** (11) One of the flippers worn by Jenny that day was found on the 3 September 1963 at a depth of about 45 feet not very far from the place where she had gone into the water. The heel strap was severed and on examination it was found that the strap had been cut in two places by a knife or sharp instrument. There was no direct evidence to show who had cut the strap but it was open to the jury, if they decided to do so, to find that it was the appellant who had cut it. It was stated by an expert witness that if a diver suddenly loses one of his flippers whilst scuba diving, his equilibrium would be upset, his mobility impaired and it might well lead to panic in the case of an inexperienced diver.
- G** (12) The conduct of the appellant after the disappearance of Jenny was described by Yusof and other witnesses. It was open to the jury to find that there was a lack of urgency in the conduct of the appellant at the relevant time.
- H** (13) Less than 24 hours after the disappearance of Jenny, the appellant made formal claims on the three insurance companies which had issued policies covering her against accidents.

[108] It will be seen from the cases referred and the decisions of the superior courts that it has been consistently held that where the prosecution case depended on circumstantial evidence the burden on the prosecution is heavier and for the conviction to be sustained, it must irresistibly point to one and only one conclusion and that is the guilt of the accused and that it has to be inconsistent with any other reasonable conclusion. In other words, in order

to sustain a conviction based on circumstantial evidence, the facts established must exclude any other inference which may point to the likelihood of innocence of the accused (see *A Jayaraman v The State of AP* 1995 Cri LJ 366).

[109] On the other hand, this court has also considered the observation made in the following cases:

[110] In *Percival Leonard Taylor, James Weaver and George Thomas Donovan* 1928 Cr App R 20 at p 21, Hewart LCJ said:

It has been said that the evidence against the applicants is circumstantial: so it, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.

[111] In *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184 at p 193, Visu Sinnadurai J said:

Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's testimony which may be lacking in truth or accuracy. In circumstantial evidence, the motives or acts speak for themselves, sometimes louder than the words of a witness, without any embellishment.

It should also be pointed out that circumstantial evidence does not depend on hypothesis, or theories, or even speculations. They must give rise to strong inferences so as to become the best evidence.

[112] In *De Gruchy v The Queen* 211 CLR 85, at p 97:

There is nothing in the law that renders proof by circumstantial evidence unacceptable or suspect of itself — 'it is no derogation of evidence to say that it is circumstantial' (see *R v Taylor, Weaver & Donovan* (1928) 21 Cr App R 20 at p 21). Sometimes circumstantial evidence constituting a 'chain of other fact sworn to by many witnesses of undoubted credibility' can actually be stronger than disputable positive eye witness evidence (see *Commonwealth v Harman* (1846) 4 pa st 269 at p 272). However, circumstantial evidence necessarily calls upon processes of reasoning that involve the drawing of inferences from a jigsaw of established facts. Amongst the pieces of the jigsaw (and any gaps in the picture that it presents) may be evidence or lack of evidence concerning motive. It is when there is such evidence (and sometimes where there is no such evidence) that a judge, conformably with the primary rule, may be expected to assist the jury on the use that may be made of any conclusions that the jury may reach concerning the presence or absence of motive.

[113] In the instant case, the chain of circumstantial evidence relied on by the prosecution and when considered as to the cumulative effect of the entire evidence, this court is unable to inter link the series of circumstances and coincidences if there is any in the chain of circumstantial evidence. The prosecution's case contains several material gaps and break in the chain of evidence in attempting to link the accused with the crime of murder as framed against him. On objective evaluation of the evidence and after applying the relevant test to determine the circumstantial evidence, the decision of this court is inescapable but to find that the prosecution has failed to establish or link the accused with the murder on the date, time and place as framed by the charge against the accused. Accordingly, the accused is entitled to the

A time honoured benefit of doubt (see *Jaharlal Das v State of Orissa* AIR 1991 SC 1388).

[114] This court is mindful that the dominant concern of the court is to ensure that justice is in truth seemed to be done not only to the accused but to the family of the deceased as well and that no hurdles are placed in the way in achieving this practical justice. On the other hand, this court cannot proceed under the pretext of having been obstructed by an ‘iron curtain’ when the evidence produced by the prosecution are glaringly at variance on a material fact as to who was last seen with the deceased. In addition, the handling of the sample of blood raises serious doubt in the way it changed hands and worst still the evidence produced in court does not show for certain from whom the sample of blood was taken. It is unfortunate that whoever is responsible or committed the murder of the deceased is not brought to justice but the guilt of an accused person must be proved in accordance with and as required by the law, and which must be certain. This court cannot act on mere suspicion however strong it may be or even if the suspicion is upon suspicion. In *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116, his Lordship HT Ong CJ said:

... the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else

E [115] In *Kali Ram v State of HP* AIR 1973 SC 2773, Khanna J for the Supreme Court said:

... The courts would not be justified in withholding that benefit because the acquittal might have an impact upon the law and order situation or create adverse reaction in society or amongst those members of the society who believe the accused to be guilty. The guilt of the accused has to be adjudged not by the fact that a vast number of people believe him to be guilty but whether his guilt has been established by the evidence brought on record. Indeed, the courts have hardly any other yardstick or material to adjudge the guilt of the person arraigned as accused. Reference is sometimes made to the clash of public interest and that of the individual accused. The conflict in this respect, in our opinion, is more apparent than real. As observed on p 3 of the book entitled ‘*The Accused*’ by JA Coutts (1966 Ed), ‘when once it is realised, however, that the public interest is limited to the conviction, not of the guilty, so that the function of the prosecutor is limited to securing the conviction only of those who can legitimately be proved guilty, the clash of interest is seen to operate only within a very narrow limit, namely, where the evidence is such that the guilt of the accused should be established. In the case of an accused who is innocent, or whose guilt cannot be proved, the public interest and the interest of the accused alike require an acquittal.’

I It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system, much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious and its reverberations cannot but be felt in a civilised society. Suppose an innocent person is convicted of the offence of murder and is hanged, nothing further can undo the mischief for the wrong resulting from the unmerited conviction is irretrievable. To take another instance, if an innocent person is sent to

jail and undergoes the sentence, the scars left by the miscarriage of justice cannot be erased by any subsequent act of expiation. Not many persons undergoing the pangs of wrongful conviction are fortunate like Dreyfus to have an Emile Zola to champion their cause and succeed in getting the verdict of guilt annulled. All this highlights the importance of ensuring, as far as possible, that there should be no wrongful conviction of an innocent person ...

[116] In *R v Courtie* [1984] 1 All ER 740 at p 741 Lord Diplock had explained the *dicta* of Lord Sankey in the case of *Woolmington v DPP* [1935] AC 462 as follows:

... an accused person cannot be convicted of any offence with which he is charged unless it has been established by the prosecution that each one of the factual ingredients which are included in the legal definition of that specific offence was present in the case that has been brought against him by the prosecution.

[117] In *PP v Lim Teong Seng And 2 Others* [1946] MLJ 108, Laville J observed:

... The onus is on the prosecution and never shifts to prove its case. The presiding officer is sitting not only as a judge but as a jury.

If therefore at the close of the prosecution he (namely, the judge) as a jury comes to the conclusion, not that there is no evidence, *but that the evidence produced is not strong enough to warrant a conviction*, and only evidence beyond all reasonable doubt is of that nature, he is not by the spirit of English law entitled to say: 'I am doubtful of this evidence but let us see if it can be supplemented and improved by what can be elicited from the defence'. The prosecution who have to prove their case beyond all reasonable doubt have produced all the evidence they have, and it is on this evidence the conviction if any must rest, even if the accused calls evidence. What the prosecution can elicit for its view from them is either supplementary or redundant, or goes to lessen the credibility of the defence evidence. It cannot be that basis of a conviction. If therefore at the close of the prosecution the Court is of opinion that on that evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt, there is nothing left for it to do but to acquit the accused.

(Emphasis added.)

[118] This court finds that the case against the accused has not been established in accordance with the requirements of the law in order to justify a finding of guilty of murder against the accused (see *William Herbert Wallace* 23 Cr App R 35). This court has considered the fact that it cannot admit 'fanciful possibilities to deflect the course of justice' and that this is not a case where the evidence is 'so strong against the accused as to leave only a remote possibility' in his favour which can be discarded. In the instant case, the evidence adduced by the prosecution, fell short of proof of a material fact which goes to the root and the substance of the case in so far as the DNA profiling evidence is concerned in that, there is insufficient evidence to link the accused with the sample of blood tested by PW14 for the DNA profiling. Merely placing labels on the envelopes, tubes and packets is not sufficient in law to show that the sample of blood was taken from the name of the person labelled on the said items, namely, the envelopes, the tubes and the packets handed to PW13 by PW12 on 22 February 2001 and subsequently handed to Sgt Asokumaran on 19 June 2001 by PW13 and subsequently which was

- A** handed by Sgt Asohkumaran to PW14 on 23 June 2001 unless there is positive and direct evidence from the person who took the sample of blood and that it was in fact taken from the accused and the deceased. The prosecution has also not adduced sufficient evidence as to why Sgt Asohkumaran who sent the 10 envelopes and 1 packet to PW14 on 23 June 2001 was not called to testify other than a bare statement from the bar by the learned deputy public prosecutor that he has gone to Timor Timor. There is no evidence from Sgt Asohkumaran that he has handed the 10 envelopes and 1 packet to PW14 on 23 June 2001 (see *Abdul Jalil bin Abdul Satar v PP* [1991] 2 MLJ 194 at p 196 and *Pendakwa Raya v Mansor bin Mohd Rashid & Anor* [1996] 3 MLJ 560 at p 573).
- B**
- C** [119] In *Shaik Meera & Anor v Regina* [1955] MLJ 158 at p 159, Spenser Wilkinson J said:
- There are certain parts of a prosecution case which, as a matter of practice, the Courts always expect to be proved as strictly as possible and one of these is proof that an exhibit produced in Court is the very thing which was found or used on the scene and that it has not been tampered with in the meantime.
- D**
- [120] The duty of proving the guilt of the accused as framed by the charge is solely and wholly on the prosecution is well settled in law and requires no reminder or repetition. There is no obligation on the accused person to establish his innocence and there is a presumption in law that every person is innocent until proven guilty. It is important to observe that this court will not encourage any sloppy prosecution and that the prosecution must ensure that their tackle was in order. The law is firmly settled that there is no duty on the part of the accused to fill in the gaps in the prosecution case or to assume anything in the conduct of the prosecution unless in a case 'where a presumption is invoked thereby placing an onus on the accused to prove certain facts' which is not the situation in the instant case (see *Jones v Carter* 1956 Crim LR 275 at p 276 and *PP v Chia Leong Foo* [2000] 6 MLJ 705 at p 733). In *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 at p 141, Abdul Hamid Omar LP said:
- E**
- F**
- There is no obligation on the accused person to establish his innocence. The duty is solely and wholly on the prosecution to prove the guilt of the accused. An accused person is entitled to the benefit of any other reasonable inference which could be deduced during the prosecution indicating his innocence. In fact, the evidence of the prosecution on its totality does not even lead to grave suspicion to link them to the murder and bearing in mind that suspicion is not evidence, however grave it may be.
- G**
- H** (see *Public Prosecutor v Abu Bakar bin Abdul Malek @ Mohd Yunus a/l Sumania* [1990] 1 CLJ 1179 at p 1186)
- [121] In *Hoh Keh Peng v PP* [1948] MLJ 3 at p 4, Spenser Wilkinson J said:
- ... Unless at the close of the case for the prosecution the offence has been made out, there is no justification for calling upon the accused for any explanation whatever. There is a positive duty upon the Judge under section 180 of the Criminal Procedure Code to acquit the accused at the close of the prosecution if he is not prepared then and there to convict without hearing more. If an accused person is called
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upon for his defence he may be able to turn the balance in his favour; *but he should never be called upon for his defence in a case of doubt so that he may convict himself by supplementing a weak prosecution case.*

(Emphasis added.)

[122] In *Public Prosecutor v Annuar bin Ali* [1948] MLJ 38 at p 39, Spenser-Wilkinson J said:

... When a judge is sitting alone, it is easy for him to reach this finding, because he is the sole judge of law and of fact, and he is the person who has to be satisfied beyond a reasonable doubt of the accused's guilt and must know at that stage whether or not he has believed the witnesses; but where the judge is sitting with the assessors, he is unable to know at the close of the case for the prosecution what view the assessors will take of the evidence which has up to that point been produced. The judge himself may not be altogether satisfied beyond all doubt, but the assessors may; unless, therefore, it is clear to the judge at the close of the case for the prosecution that the assessors could not reasonably find the accused guilty on the evidence adduced if full weight were given to it, then it seems to me that the accused must be called upon for his defence.

[123] In *Public Prosecutor v Lam Kim Pau & 6 Others* [1948] MLJ 116, Laville J said 'it cast upon the judge the grave onus of deciding whether the case so far made out is one which warrants a conviction, and, if he decides that it does not, he shall — the term is mandatory — record an order of acquittal.'

[124] In *Ibrahim v PP* [1962] MLJ 235, Hashim J said:

The defence should not be called where the prosecution has failed to prove its case. Under no circumstances should a Magistrate call for the defence merely to clear any doubt he may have in his mind as to whether the prosecution had or had not proved its case.

(Emphasis added.)

[125] In *Krishnan v Public Prosecutor* [1987] 1 MLJ 292, at p 295, his Lordship Wan Sulaiman SCJ said:

It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. *It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death.* But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that *his guilt must be proved in accordance with or in a manner required by law.* Anything less will not be enough.

(Emphasis added.)

[126] In *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 at p 425, his Lordship Mohamed Yusoff SCJ said:

Be that as it may, we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant ...

A In the present case we are of the view that although it is unfortunate that a guilty party cannot be brought to justice, it is more important that there should not be a miscarriage of justice and the law should be maintained that the prosecution should prove its case.

B [127] In *R v Kelly* (1992) 92 DLR (4th) 643 (SCC) at p 667, his Lordship McLachlin J said:

It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the maxim *nullum crimen sine lege, nulla poena sine lege* — *there must be no crime or punishment except in accordance with law which is fixed and certain.*

(Emphasis added.)

C [128] In *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 at p 9, his Lordship Edgar Joseph Jr SCJ said:

D True it is that though there were several strands of evidence pointing to the appellant's guilt, not one of them alone was of great moment and the question arises, whether *juncta jvant* it could be said that there was sufficient evidence to support a verdict of guilty. It was our view that this question must be answered in favour of the appellant considering that there was more than one way in which the evidence adduced by the prosecution might be viewed

E Having examined the evidence led by the prosecution afresh, we found that the evidence left too many questions unanswered with the result that the proverbial cap might have fitted not just the head of the appellant but that of others as well. (see also *Gooi Loo Seng v PP* [1993] 2 MLJ 137 at p 142)

F [129] In *Public Prosecutor v Muhamad Nasir bin Shahrudin & Anor* [1994] 2 MLJ 576 at p 592, his Lordship Visu Sinnadurai J said:

It is one of the most basic rules of justice that, however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, *he can only be convicted on evidence produced according to the stringent requirements of the law.* It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But ...his *guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.* (Emphasis added.)

G [130] In *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 at p 441, His Lordship Edgar Joseph Jr FCJ said:

H We were thus driven to the inevitable conclusion that the maintenance of the principle involved in this case was more important than the case itself. This is the principle enunciated in *Maxwell v DPP* [1934] 24 Cr App Rep 152 at p 176; [1934] All ER Rep 168 at p 175:

‘... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded or discredited.’

I [131] In *Kiew Foo Mui & Ors v Public Prosecutor* [1995] 3 MLJ 505 at p 511, his Lordship Edgar Joseph Jr FCJ said:

In our view, the learned judge remained under such a duty since it is not just of some importance, but of fundamental importance to the administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset — namely a fair trial, notwithstanding the shortcomings of his counsel. It is axiomatic that the primary duty of a judge at any trial — whether criminal or civil — is to ensure that justice is done, no doubt, according to law.

We then went on to consider the final question of critical substance which arose on this part of the case, namely, whether the failure of the prosecution, the defence and the learned judge, to discharge their respective duties, as aforesaid, had occasioned a failure of justice.

[132] In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 at p 80, his Lordship Gopal Sri Ram JCA said:

In our respectful view, the correct test to be applied in determining whether a *prima facie* case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FCJ (as he then was) in *Dato' Mokhtar bin Hashim v PP* [1983] 2 MLJ 232 at p 270.

... It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

... In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.

... In *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678 at p 691, Vincent Ng J expressed his view on the amendment to section:

'Thus, to me, maximum evaluation simply means evaluation, on a *prima facie* basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led rather than the persuasive burden in terms of qualitative degree of proof.

What then constitutes a '*prima facie* case'? '*Prima facie*' means on the face of it or at first glance. To me, in the light of Act A979, perhaps the most appropriate definition of a '*prima facie* case' could be found in the *Oxford Companion of Law* (p 987), which has it as:

"A case which is sufficient to call for an answer. While *prima facie* evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive."

It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected. (Emphasis added.)

- A The same learned judge in *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480 at p 491 said:

‘In my view the prosecution could be ruled to have ‘made out a prima facie case against the accused’ when the probative force of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore wrong for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and — to reiterate — there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. In substance, this is what Gordon Smith Ag JA held in *PP v Chin Yoke* [1940] MLJ 47.’

- D Although we might have expressed the test in different words, we agree with the formulation of the test in *Ong Cheng Heong* and *Saare Hama*. In our judgment, these two cases accurately set out the approach that is to be adopted under ss 173(f) and 180 of the CPC at the conclusion of the prosecution’s case.

... If this passage is meant to suggest that the evidence led by the prosecution must receive maximum evaluation, then we would agree with it. But if what is meant is that a court ought to go further and determine whether the prosecution at the end of its case has proved the case against the accused beyond a reasonable doubt, then we find ourselves in disagreement with the learned judge in that case. In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage.

- F (see (1) *Public Prosecutor v R Balasubramaniam* [1948] MLJ 119; *Ibrahim v Public Prosecutor* [1962] MLJ 235; (3) *Zahari bin Yeop Baai & Anor v Public Prosecutor* [1980] 1 MLJ 160 and (4) *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678).

G [133] On the totality of the evidence adduced by the prosecution through 15 witnesses, it is regrettable that the prosecution’s case contains infirmities and improbabilities that the charge cannot be sustained or even amended to a lesser charge. The prosecution has failed to establish a prima facie case (see s 180 of the Criminal Procedure Code) against the accused on the charge of murder or any offence on the date, time and place as framed by the prosecution although the case law is that the prosecution has to establish its case beyond reasonable doubt where the prosecution has relied on circumstantial evidence.

H Therefore, this court is left with no alternative but to acquit and discharge the accused. In acquitting the accused, this court has also considered the observation made by Mason P in *Regina v GK* [2001] NSWCCA 413 where it is stated:

- I It is not the judicial function to give the accused a fighting chance of gaining an acquittal, as if the trial were a horse race and the Judge were a handicapper deciding how much weight to place in the Crown’s saddlebags. The admissibility of evidence is not in an inverse ratio to its probative effect.

[134] On the other hand, it has also been observed by Mason P in that case where it is stated:

Experience teaches that witnesses can be '100 percent certain', yet wrong. And, so long as juries determine issues of guilt, jurors will be entitled to reject the confident testimony of lay and scientific witnesses, especially if it does not fit with other evidence that they do accept.

[135] Accordingly, the accused was acquitted and discharged without calling for his defence.

Accused acquitted.

Reported by Mariette Peters Goh

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